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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK

FROM AND INCLUDING DECISIONS OF OCTOBER 7, TO AND
INCLUDING DECISIONS OF DECEMBER 9, 1902.

WITH

NOTES, REFERENCES AND INDEX

BY EDWIN A. BEDELL,
STATE REPORTER.

VOLUME 172.

ALBANY
J. B. LYON COMPANY.
1903.

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JUDGES OF THE COURT OF APPEALS.

ALTON B. PARKER, CHIEF JUDGE.

JOHN C. GRAY,

DENIS O'BRIEN,

EDWARD T. BARTLETT,

ALBERT HAIGHT,

CELORA E. MARTIN,

IRVING G. VANN,

ASSOCIATE JUDGES.

EDGAR M. CULLEN,

WILLIAM E. WERNER,

JUSTICES OF THE SUPREME COURT SERVING AS
ASSOCIATE JUDGES.*

* Designated by the Governor January 1, 1900, under section 7 of article VI of the Constitution, as amended in 1899.

ERRATUM.

In *Tremblay v. Harmony Mills*, 171 N. Y. at page 602,
in twenty-seventh line from top of page the word "highway"
should be "yard."

1

TABLE OF CASES

REPORTED IN THIS VOLUME.

A.		PAGE			PAGE.
Adams v. Elwood.....	603		British America Assurance Co.,		
Allen, Jamestown Business Col-			Kaiser v	663	
lege Assn. v.....	291		Brooklyn Heights R. R. Co.,		
Allison, In re, v. Welde.....	421		People ex rel. Linton v.....	90	
American Loan & Trust Co.,			Buffalo & Rochester Transit		
People v.....	371		Co., Wagner v.....	634	
Ashley, Fleitmann v	628		Busch v. Cummings.....	621	
Aultman & Taylor Machinery			Bushnell, In re (Estate)	649	
Co., Curran Manfg. Co. v....	628				
B.			C.		
Bailey, Ziegler v.....	635		Carpenter v. Bouton	657	
Baird v. N. Y. C. & H. R. R.			Carter, Zapf v	666	
R. Co.....	637		Cary, Flaherty v... ..	646	
Baird, Quinn v.....	631		Catholic University of America,		
Baker, In re (Accounting).....	617		Beck v.....	387	
Banigan, West v.....	622		Central Union Gas Co., People		
Bank of Monongahela Valley v.			ex rel., v. Weils	607	
Weston.....	259		Chapman, In re... ..	620	
Barnes, Merchants' Nat. Bank			Cheesebro v. Corning... ..	626	
of Plattsburgh v.....	618		Chenango Valley Sav. Bank v.		
Bassford, In re, v. Johnson....	488		King	636	
Batt, People ex rel., v. West... 649			City of Middletown, Farrell		
Beck v. Catholic University of			v.....	666	
America.....	387		City of New York, Van Siclen		
Berkery v. Erie R. R. Co.....	636		v.....	504	
Bermel v. N. Y., N. H. & H.			City of New York, Wenk v....	601	
R. R. Co.....	639		City of Rochester, Hooker v... 665		
Betz, Lillenthal v.....	643		City of Rochester v. Rochester		
Binzen v. Epstein.....	596		Bill Posting Co.....	608	
Bissert, People v... ..	643		Clark v. Cliff Paper Co.....	624	
Bly v. Edison Electric Ill. Co.			Clifford, In re, v. York.....	650	
of New York.....	1		Cliff Paper Co., Clark v.....	624	
Board Suprs. Westchester Co.,			Cole, Second Nat. Bank of Cort-		
In re Douglas v.....	309		land v.....	657	
Bouton, Carpenter v.....	657		Collateral Loan Assn., Lowry		
Boyle & Everts Co. v. Fox....	604		v.....	394, 633	
Brewer v. Gilmore	597		Collier v. Collins....	99	
Brez, In re (Estate).....	609, 648		Collins, Collier v.....	99	
			Collins v. Fowler.....	634	

	PAGE.		PAGE.
Connecticut Mut. L. Ins. Co.,		Elmira, C. & N. R. R. Co.,	
Louis v.....	659	Orvis v.....	656
Connecticut Trust & Safe		Elwood, Adams v.....	603
Deposit Co. v. Wead.....	497	Epstein, Binzen v.....	596
Corey, McGuire v.....	637	Erie R. R. Co., Berkery v.....	636
Corkran, People ex rel., v.		Erie R. R. Co., Minor v.....	648
Hyatt.....	176		
Corning, Cheesebro v.....	626	F.	
Corning, Spink v.....	626	Farley v. Howard.....	628
Cosselmon v. Dunfee.....	507	Farmers' Loan & Trust Co.,	
Coykendall, Tilley v.....	587	Fleisher v.....	519
Culver, Rice v.....	60, 630	Farmers' Loan & Trust Co.,	
Cummings, Busch v.....	621	Lowry v.....	137
Curran Manfg. Co. v. Ault-		Farmers' Loan & Trust Co.,	
man & Taylor Machinery Co.	623	Rhineland v.....	519
		Farrell v. City of Middletown..	666
D.		Featherstonhaugh, People ex	
Dady v. O'Rourke.....	447	rel. North, v.....	112
Damon, N. Y. Milk Products		Feitner, People ex rel. Zolli-	
Co. v.....	661	koff v.....	618
Davenport, In re (Accounting).	454	Fifth Ave. Baptist Church,	
Delaware, L. & W. R. R. Co.,		Tabernacle Baptist Church v.	598
Moeller v.....	644	Fire Assn. of Philadelphia,	
Dept. Public Works New York		Kaiser v.....	664
City, In re.....	655	Flaherty v. Cary.....	646
Deuble v. Grand Lodge A. O.		Flaherty v. Murray.....	646
U. W.....	665	Flege, Horstmann v.....	381
Deuterman v. Pollock.....	595	Fleisher v. Farmers' Loan &	
Dimon v. N. Y. C. & H. R. R.		Trust Co.....	519
R. Co.....	602	Fleitmman v. Ashley.....	628
Dinan, Peggo v.....	605	Fogerty v. Union Ry. Co. of	
Doddy, People v.....	165	New York City.....	601
Dorney v. O'Neill.....	595	Foote, Hoffman House, New	
Douglas, In re, v. Board Suprs.		York, v.....	348
Westchester Co.....	309	Foote, Stokes v.....	327
Dry Dock, E. B. & B. R. R. Co.,		Fornes, In re Shaughnessy v....	323
Gonorovsky v.....	625	Fowler, Collins v.....	634
Duncombe, Niemoller v.....	621	Fox, Boyle & Everts Co. v.....	604
Dunfee, Cosselmon v.....	507	Frankenstein v. Hamburger...	609
Duryea, Hamerschlag v.....	622	Fulton, Village of, Spitzer v....	285
E.		G.	
Eastern Bldg. & Loan Assn.,		Gage, Playa de Oro Mining Co.	
Vought v.....	508	v.....	630
Edison Electric Ill. Co. of New		Garver, Home Bank v.....	632
York, Bly v.....	1	Genoa, Town of, Oswego Co.	
Elliott, People v.....	146	Sav. Bank v.....	635

vii

	PAGE.	I.	PAGE.
Gilmore, Brewer v.	597	Ingraham v. National Salt Co. .	644
Ginsburg v. Von Seggern.....	662	In re Allison v. Welde.....	421
Gleason, People ex rel., v. Scan-		In re Baker (Accounting).....	617
nell	316	In re Bassford v. Johnson.....	488
Goetz, In re (Accounting).....	608	In re Brez (Estate).....	609, 648
Goldmark v. Magnolia Anti-		In re Bushnell (Estate).....	649
Friction Metal Co.....	645	In re Chapman.....	620
Gonorovsky v. Dry Dock, E. B.		In re Clifford v. York	650
& B. R. R. Co.	625	In re Davenport (Accounting)..	454
Gorden, In re (Accounting). 25,	648	In re Dept. Public Works New	
Grand Lodge A. O. U. W., Deu-		York City.....	655
ble v.....	665	In re Douglas v. Board Suprs.	
Great Western Turnpike Co.,		Westchester Co.....	309
President, etc., v. Shafer.....	662	In re Goetz (Accounting).....	608
Greenwich & J. Ry. Co., In re,		In re Gorden (Accounting).. 25,	648
v. Greenwich & S. Electric		In re Greenwich & J. Ry. Co. v.	
R. R.....	462, 667	Greenwich & S. Electric R.	
Greenwich & S. Electric R. R.,		R.....	462, 667
In re Greenwich & J. Ry. Co.		In re Hamilton (Accounting)...	652
v.....	462, 667	In re Hopkins (Will).....	360
H.		In re Jones (Estate).....	575
Hamburg-Bremen F. Ins. Co.,		In re Killan (Estate).....	547
Kaiser v.....	663	In re King (Estate).....	616
Hamburger, Frankenstein v....	609	In re Ludlow Street (Opening).	542
Hamerschlag v. Duryea.....	622	In re Mayor, etc., of New York	
Hamilton, In re (Accounting)..	652	(Fordham Road).....	653
Harris, Holcomb v.....	660	In re Newcomb (Estate).....	608
Havemeyer, Hentz v.....	597	In re N. Y. Juvenile Asylum..	50
Hawe v. N. Y., Westchester &		In re Rogers (Estate).....	617
Conn. Traction Co.....	601	In re Shaughnessy v. Fornes... 328	
Hentz v. Havemeyer.....	597	In re Smith v. Mingey.....	650
Heyser v. Peterson.....	661	In re Swales (Estate).....	651
Higgins, Kalish v.....	647	In re Union Trust Co. of New	
Hoeninghaus v. Holden.....	629	York (Accounting).....	494
Hoffman House, New York, v.		In re Vanderbilt (Estate).....	69
Foote	348	Irving Nat. Bank, Meislahn v..	681
Holcomb v. Harris	660	J.	
Holden, Hoeninghaus v....	629	Jacobson v. Smith.....	654
Home Bank v. Garver.....	632	Jamestown Business College	
Hooker v. City of Rochester ..	665	Assn. v. Allen.....	291
Hopkins, In re (Will).....	360	Jenkins, Van Clief v.....	627
Horstmann v. Flege.....	381	Jewell v. McIntyre.....	638
Howard, Farley v.....	628	Johnson, In re Bassford v.	488
Hyatt, People exrel. Corkran		Jones, In re (Estate).....	575
v.....	176	Jones, Masons' Supplies Co.	
		v.....	598

K.		P.	
	PAGE.		PAGE.
Kaiser v. British America Assur. Co.....	663	McNulty v. Mount Morris Electric Light Co....	410
Kaiser v. Fire Assn. of Philadelphia.....	664	Magnolia Anti-Friction Metal Co., Goldmark v.....	645
Kaiser v. Hamburg-Bremen F. Ins. Co.....	663	Malone v. Saints Peter & Paul's Church.....	269
Kaiser v. Svea Assurance Co....	664	Marcellus Electric R. R. Co., Stevens v.....	630
Kalish v. Higgins.....	647	Masons' Supplies Co. v. Jones..	598
Keegan v. Smith.....	624	Matter of Allison v. Welde....	421
Keim, Phenix Nat. Bank v.....	602	Matter of Baker (Accounting)..	617
Keller v. Lee.....	606	Matter of Bassford v. Johnson.....	488
Killan, In re (Estate).....	547	Matter of Brez (Estate)....	609, 648
King, Chenango Valley Sav. Bank v....	636	Matter of Bushnell (Estate)....	649
King, In re (Estate).....	616	Matter of Chapman.....	620
King v. King.....	604	Matter of Clifford v. York....	650
Kneeland, Weigley v.....	625	Matter of Davenport (Accounting). .	454
L.		Matter of Dept. Public Works New York City.....	655
Lackawanna Transportation Co., Nat. Commercial Bank of Albany v.	596	Matter of Douglas v. Board Suprs. Westchester Co.....	309
Lederle, People ex rel. Newland v.....	653	Matter of Goetz (Accounting)..	608
Lee, Keller v.....	606	Matter of Gorden (Accounting). .	25 648
Levy v. Schreyer.....	606	Matter of Greenwich & J. Ry. Co. v. Greenwich & S. Electric R. R.....	462, 667
Lilienthal v. Betz.....	643	Matter of Hamilton (Accounting)....	652
Lindenborn, McCready v.....	400	Matter of Hopkins (Will).....	360
Linton, People ex rel., v. Brooklyn Heights R. R. Co.....	90	Matter of Jones (Estate)....	575
Louis v. Connecticut Mut. L. Ins. Co.	659	Matter of Killan (Estate).....	547
Lowden, Ottawa v.....	129	Matter of King (Estate).	616
Lowe, Prole v.....	629	Matter of Ludlow Street (Opening).....	542
Lowry v. Collateral Loan Assn.....	394, 633	Matter of Mayor, etc., of New York (Fordham Road).....	653
Lowry v. Farmers' Loan & Trust Co.....	137	Matter of Newcomb (Estate)...	608
Ludlow Street, In re (Opening). .	542	Matter of N. Y. Juvenile Asylum.....	50
M.		Matter of Rogers (Estate).....	617
McCann v. N. Y. & Queens Co. Ry. Co.	599	Matter of Shaughnessy v. Fornes.....	323
McCready v. Lindenborn.....	400	Matter of Smith v. Mingey....	650
McGuire v. Corey.....	637	Matter of Swales (Estate).....	651
McIntyre, Jewell v.....	638		

TABLE OF CASES REPORTED.

ix

	PAGE.		PAGE.
Matter of Union Trust Co. of New York (Accounting).....	494	N. Y. C. & H. R. R. R. Co., Baird v.....	637
Matter of Vanderbilt (Estate) ..	69	N. Y. C. & H. R. R. R. Co., Dimon v.....	602
Matthews, Uihlein v.....	154	New York, City of, In re Dept. Public Works.....	655
Mayor, etc., of New York, In re (Fordham Road).....	653	New York, City of, Van Sicken v.....	504
Mayor, etc., of New York, Mercantile Nat. Bank of N. Y. City v.....	35	New York, City of, Wenk v....	601
Meislahn v. Irving Nat. Bank..	631	N. Y. Juvenile Asylum, In re.	50
Mercantile Nat. Bank of N. Y. City v. Mayor, etc., of New York.....	35	New York, Mayor, etc., of, In re (Fordham Road).....	653
Merchants' Nat. Bank of Platts- burgh v. Barnes ...	618	New York, Mayor, etc., of, Merc- cantile Nat. Bank of N. Y. City v.....	35
Metropolitan St. Ry. Co., Stiasny v.....	656	N. Y. Milk Products Co. v. Damon.....	661
Middletown, City of, Farrell v.....	666	N. Y., N. H. & H. R. R. Co., Bermel v.	689
Milla v. Thomas Elevator Co....	660	N. Y. & Queens Co. Ry. Co., McCann v.	599
Mingey, In re Smith v.....	650	N. Y., Westchester & Conn. Traction Co., Hawe v.....	601
Minor v. Erie R. R. Co.....	648	Niemoller v. Duncombe.....	631
Moeller v. Delaware, L. & W. R. R. Co.....	644	North, People ex rel., v. Feather- stonhaugh.....	113
Morrow v. Westchester Electric Ry. Co.....	638		
Mount Morris Bank v. Twenty- third Ward Bank.....	244	O.	
Mount Morris Electric Light Co., McNulty v.....	410	O'Neill, Dorney v.....	595
Murphy v. Supreme Council C. M. B. Assn.....	659	O'Rourke, Dady v.....	447
Murray, Flaherty v.....	646	Orvis v. Elmira, C. & N. R. R. Co.....	656
		Oswego Co. Sav. Bank v. Town of Genoa.....	635
N.		Ottaway v. Lowden.....	129
National Bank of the Republic of N. Y., National Revere Bank of Boston v.....	102	P.	
National Commercial Bank of Albany v. Lackawanna Trans- portation Co.....	596	Partridge, People ex rel. Waddy v.....	305
National Revere Bank of Boston v. National Bank of the Re- public of N. Y.....	102	Patrick, People v.....	599
National Salt Co., Ingraham v.	644	Peggo v. Dinan.....	605
Newcomb, In re (Estate).....	608	People v. American Loan & Trust Co.....	371
Newland, People ex rel., v. Lederle.....	653	People v. Bissert.....	643
		People v. Doody.....	165
		People v. Elliott.....	146
		People v. Patrick.....	599
		People v. Smith.....	210

TABLE OF CASES REPORTED.

PAGE.	PAGE.
People ex rel. Batt v. West.... 649	Rockland Lake Trap Rock Co.,
People ex rel. Central Union	Weiant v..... 600, 645
Gas Co. v. Wells..... 607	Rogers, In re (Estate)... 617
People ex rel. Corkran v. Hyatt. 176	
People ex rel. Gleason v. Scan-	S.
nell 316	Saints Peter & Paul's Church,
People ex rel. Linton v. Brook-	Malone v..... 269
lyn Heights R. R. Co 90	Sandford v. Wagner..... 605
People ex rel. Newland v. Led-	Scannell, People ex rel. Glea-
erle..... 653	son v..... 316
People ex rel. North v. Feather-	Scannell, People ex rel. Weise
stonhaugh..... 112	v 607
People ex rel. Waddy v. Part-	Schreyer, Levy v..... 606
ridge..... 305	Schwaman v. Truax 658
People ex rel. Weise v. Scan-	Second Nat. Bank of Cortland
nell..... 607	v. Cole..... 657
People ex rel. Zollikoffer v.	Second Nat. Bank of Morgan-
Feitner..... 618	town v. Weston..... 250
Peterson, Heyser v 661	Servis v. Servis..... 438
Phenix Nat. Bank v. Keim . . 602	Shafer, President, etc., Great
Playa de Oro Mining Co. v.	Western Turnpike Co. v.... 662
Gage..... 630	Shaughnessy, In re, v. Fornes. 323
Pollock, Deuterman v. 595	Smith, In re, v. Minge..... 650
President, etc., Great Western	Smith, Jacobson v 654
Turnpike Co. v. Shafer..... 662	Smith, Keegan v..... 624
Prole v. Lowe..... 629	Smith, People v..... 210
Prudential Ins. Co. of America,	Spink v. Corning..... 626
Steinbach v..... 471	Spitzer v. Village of Fulton... 285
Prudential Ins. Co. of America,	Squiers v. Thompson..... 652
Sullivan v 482	Stannard v. Whitestone Forge
	& Constr. Co 627
Q.	Steinbach v. Prudential Ins. Co.
Quinn v. Baird..... 631	of America..... 471
	Sternberger, Verity v..... 633
R.	Stevens v. Marcellus Electric R.
Reichert v. Stilwell..... 83, 649	R. Co..... 630
Rhineland v. Farmers' Loan	Stiasny v. Metropolitan St. Ry.
& Trust Co..... 519	Co..... 656
Rhines, Richardson v..... 658	Stillman, Richards v... 633
Rice v. Culver..... 60, 630	Stilwell, Reichert v..... 83, 649
Richards v. Stillman..... 632	Stokes v. Foote 327
Richardson v. Rhines..... 658	Sullivan v. Prudential Ins. Co.
Rochester Bill Posting Co., City	of America... 482
of Rochester v..... 603	Supreme Council C. M. B. Assn.,
Rochester, City of, Hooker v.. 665	Murphy v 659
Rochester, City of, v. Rochester	Supreme Tent of K. of M.,
Bill Posting Co..... 603	Weber v..... 490

TABLE OF CASES REPORTED.

xi

	PAGE.		PAGE.
Svea Assurance Co., Kaiser v. . .	664	Waddy, People ex rel., v. Part- ridge.	305
Swales, In re (Estate).	651	Wagner v. Buffalo & Rochester Transit Co.	634
T.		Wagner, Sandford v.	605
Tabernacle Baptist Church v. Fifth Ave. Baptist Church. . .	598	Washington L. Ins. Co., Te Bow v.	623
Tallman, Utica City Nat. Bank v.	642	Wead, Connecticut Trust & Safe Deposit Co. v.	497
Te Bow v. Washington L. Ins. Co.	623	Weber v. Supreme Tent of K. of M.	490
Thomas Elevator Co., Mills v. .	660	Weiant v. Rockland Lake Trap Rock Co.	600, 645
Thompson, Squiers v.	652	Weigley v. Kneeland	625
Tilley v. Coykendall.	587	Weise, People ex rel., v. Scan- nell.	607
Town of Genoa, Oswego Co. Sav. Bank v.	635	Welde, In re Allison v.	421
Truax, Schwaman v.	658	Wells, People ex rel. Central Union Gas Co. v.	607
Trust & Deposit Co. of Onon- daga v. Verity.	620	Wenk v. City of New York. . .	601
Twenty-third Ward Bank, Mount Morris Bank v.	244	West v. Banigan.	623
U.		West, People ex rel. Batt v. . . .	649
Uihlein v. Matthews.	154	Westchester Co., Board Suprs. of, In re Douglas v.	309
Union Rf. Co. of New York City, Fogerty v.	601	Westchester Electric Ry. Co., Morrow v.	638
Union Trust Co. of New York City, In re (Accounting). . . .	494	Weston, Bank of Monongahela Valley v.	259
Utica City Nat. Bank v. Tall- man	642	Weston, Second Nat. Bank of Morgantown v.	250
V.		Whitestone Forge & Constr. Co., Stannard v.	627
Van Clief v. Jenkins.	627	Y.	
Vanderbilt, In re (Estate). . . .	69	York, In re Clifford v.	650
Van Siclen v. City of New York.	504	Z.	
Verity v. Sternberger.	633	Zapf v. Carter.	666
Verity, Trust & Deposit Co. of Onondaga v.	620	Ziegler v. Bailey.	635
Village of Fulton, Spitzer v. . .	285	Zollkoffer, People ex rel., v. Feitner.	618
Von Seggern, Ginsburg v. . . .	662		
Vought v. Eastern Bldg. & Loan Assn.	508		

TABLE OF CASES

CITED IN THE OPINIONS REPORTED IN THIS VOLUME.

A.		PAGE.
Adams v. People.....	1 N. Y. 173.....	185, 186
Adams v. Roscoe Lumber Co.....	159 N. Y. 176	318
Adee v. Campbell.....	79 N. Y. 52.....	460
Adsit v. Adsit.....	2 Johns. Ch. 448, 451... 29, 384, 386	
Alexander v. Kerr.....	2 Rawle, 88.....	10
Allen v. City of Davenport.....	107 Iowa, 90, 101.....	121
Allen v. Stevens.....	161 N. Y. 122.....	614
American Ex. Nat. Bank v. N. Y. Belting & P. Co.....	148 N. Y. 698.....	254
Amherst College v. Ritch.....	151 N. Y. 282.....	6
Ansonia Brass & Copper Co. v. Conner.....	98 N. Y. 574.....	496
Armstrong v. Lake Champlain Granite Co.....	147 N. Y. 495.....	159
Arnold v. Kempstead.....	2 Ves. Ch. R. 572, 578.....	385, 386
Arnold v. Ruggles.....	1 R. I. 165, 168.....	532
Arthur v. Homestead F. Ins. Co....	78 N. Y. 462.....	486
Asche v. Asche.....	113 N. Y. 232, 235.....	30, 32, 33
Astor v. L'Amoureux.....	8 N. Y. 107.....	419
Ayrault v. Pacific Bank.....	47 N. Y. 570.....	107
B.		
Baird v. Baird.....	145 N. Y. 659, 664.....	302, 303
Baker v. Baker.....	16 Abb. N. C. 293.....	444
Baker v. Sanderson.....	3 Pick. 352.....	13, 21, 23
Bank of Batavia v. N. Y., L. E. & W. R. R. Co.....	106 N. Y. 199.....	267
Bank of Monongahela Valley v. Weston.....	159 N. Y. 201.....	253
Barber Asphalt Paving Co. v. French.....	158 Mo. 534; 54 L. R. A. 492....	121
Barber Asphalt Paving Co. v. Hezel.	48 L. R. A. 235.....	121
Barber Asphalt Paving Co. v. Ullman.....	137 Mo. 543.....	121, 123
Barhyte v. Shepherd.....	35 N. Y. 238.....	41
Bassett v. Bassett.....	55 Barb. 505.....	502, 503
Bath Gas L. Co. v. Claffy.....	151 N. Y. 24.....	518
Baxter v. Hozier.....	5 Bing. N. C. 288.....	278
Baxter v. McDonnell.....	154 N. Y. 432.....	280

	PAGE.
Beals v. Guernsey	8 Johns. 446..... 151
Beards v. Wheeler	76 N. Y. 213..... 554
Bedingfield v. Onslow	8 Lev. 209..... 12, 21, 22
Beedle v. Bennett.....	122 U. S. 71..... 415, 418
Befwick v. Cunden.....	Cro. Eliz. 402..... 10
Bell v. Midland Ry. Co.....	10 C. B. (N. S.) 287..... 12, 21
Bennett v. Bennett.....	116 N. Y. 584..... 444
Bennett v. Cook.....	43 N. Y. 537..... 502
Benton v. Martin.....	52 N. Y. 570, 574..... 302
Birmingham v. Kirwan	2 Sch. & Lef. 452..... 29
Bissell v. Mich. So. & No. Ind. R. } R. Cos.....	22 N. Y. 258..... 518
Blackwood v. Van Vleit.....	80 Mich. 118..... 431
Blewitt v. Boorum.....	142 N. Y. 357..... 296, 302, 303
Bliss v. Hall.....	4 Bing. (N. C.) 188..... 14
Blunt v. Aikin	15 Wend. 526..... 14
Bly v. Edison El. Ill. Co.....	172 N. Y. 1..... 506
Bohan v. Port Jervis Gas Light Co.	122 N. Y. 18..... 6
Bolton v. Schriever.....	135 N. Y. 65..... 564
Bookstaver v. Jayne.....	60 N. Y. 146 .. 301, 302
Boos v. World Mut. L. Ins. Co. ...	64 N. Y. 236, 242..... 101
Booth v. Cleveland Rolling Mill Co.	74 N. Y. 15..... 532, 540
Boyd v. City of Milwaukee... ..	92 Wis. 456; 66 N. W. Rep. 603. 121
Bradley v. Holdsworth.....	8 M. & W. 422..... 584
Brady v. Spurck.....	27 Ill. 478..... 158
Brady v. Weeks.....	3 Barb. 157..... 14
Brennan v. Mayor, etc., of N. Y....	62 N. Y. 365..... 320
Brevoort v. Grace.....	53 N. Y. 245..... 73
Brick's Estate.....	15 Abb. Pr. 12..... 278
Briggs v. Central Nat. Bank.....	89 N. Y. 182..... 107, 108
Brown v. Commonwealth.....	73 Penn. St. 321..... 150
Brown v. Jenks.....	98 Cal. 10; 32 Pac. Rep. 701.... 121
Brown v. Spafford.. ..	95 U. S. 474..... 297
Brown v. Wiley	61 U. S. 442..... 297
Bruce v. Fulton Nat. Bank.....	79 N. Y. 154..... 540
Bryant v. United States.....	167 U. S. 104..... 207
Buffalo & S. L. R. R. Co. v. } Supervisors.....	48 N. Y. 98..... 41
Burkitt v. Harper.....	79 N. Y. 278..... 67
Burroughs v. Bloomer.....	5 Denio, 532..... 502
Butler v. Johnson.....	111 N. Y. 204..... 16

C.

Campbell v. Consals.....	25 N. Y. 613..... 342
Campbell v. Seaman.....	63 N. Y. 568..... 10, 14
Campbell v. Stokes.....	142 N. Y. 23..... 72

TABLE OF CASES CITED.

XV

	PAGE.
Canajoharie Nat. Bank v. Diefendorf.....	123 N. Y. 191, 202.... 254, 257, 268
Canter v. People.....	1 Abb. Ct. App. Dec. 305, 308.. 227
Case v. Phoenix Bridge Co.....	184 N. Y. 78..... 159
Cheever v. Pittsburgh, S. & L. E. R. R. Co.....	150 N. Y. 59, 66..... 255, 268
City of Buffalo v. Balcom.....	184 N. Y. 532..... 518
City of Kansas City v. Hanson.....	60 Kan. 833..... 121
City of Portland v. Bituminous Co.....	83 Oreg. 307; 52 Pac. Rep. 28... 121
Clark v. Wooster.....	119 U. S. 322, 325..... 415, 418
Clarkson v. Clarkson.....	18 Barb. 646..... 141
Clemens v. Clemens.....	37 N. Y. 78, 74..... 345, 569
Cleveland Trust Co. v. Lander.....	184 U. S. 111..... 583
Closs v. Eldert.....	30 App. Div. 338..... 387
Clowes v. Staffordshire Potteries W. W. Co.....	L. R. (8 Ch. App.) 125..... 12, 21
Cogswell v. N. Y., N. H. & H. R. R. Co.....	103 N. Y. 10..... 6
Cogswell v. N. Y., N. H. & H. R. R. Co.....	105 N. Y. 319..... 415, 418, 419
Cole v. Fall Brook Coal Co.....	159 N. Y. 59, 65..... 239
Cole v. Jessup.....	10 N. Y. 96..... 502
Cole v. People, etc.....	161 Ill. 16..... 121, 122
Collins v. Tillou.....	26 Conn. 368..... 164
Colrick v. Swinburne.....	105 N. Y. 503..... 16
Commonwealth v. Brady.....	5 Gray, 78..... 173
Commonwealth v. Grant.....	116 Mass. 17..... 173
Commonwealth v. Harrington.....	3 Pick. 26..... 205
Commonwealth v. McCormick.....	130 Mass. 61, 62.. 227
Commonwealth v. McDermott.....	123 Mass. 440..... 234
Commonwealth v. P. F. C. S. Bank.....	5 Allen, 423, 436..... 47
Commonwealth v. Richards.....	35 Mass. (18 Pick.) 434..... 150
Cook v. Hart.....	146 U. S. 183..... 181, 184, 188
Corning v. McCullough.....	1 N. Y. 47... 586
Crary v. Sprague.....	12 Wend. 41, 45..... 151
Cuff v. Dorland.....	57 N. Y. 560, 564..... 419
Cummings v. National Bank.....	101 U. S. 153..... 44, 49

D.

Day v. N. Y. C. R. R. Co.....	31 Barb. 548..... 158
Day v. Roth.....	18 N. Y. 448..... 355
De Beerski v. Paige.....	47 Barb. 172; 86 N. Y. 537. ... 301
De Klyn v. Gould.....	165 N. Y. 282, 286..... 391, 392
Devoy v. Mayor, etc., of N. Y.....	86 N. Y. 449... 434
Donovan v. Standard Oil Co.....	155 N. Y. 112..... 641
Duchess of Kingston's Case.....	Everest & Strode, 410..... 342

	PAGE.
Dudley v. Congregation of St. Francis	138 N. Y. 451..... 89
Dunkley v. Van Buren.....	3 Johns. Ch. 330..... 89

E.

Earle v. Hart	20 Hun, 75..... 567
Edmonston v. McLoud.....	16 N. Y. 543..... 419
Edson v. Bartow.....	154 N. Y. 199, 217..... 420
Eighmy v. People.....	79 N. Y. 546, 559..... 243
Elliotson v. Feetham.....	2 Bing. (N. C.) 134..... 14
Ely v. Holton.....	15 N. Y. 595..... 431
Embury v. Conner	3 N. Y. 511, 522..... 344
Engel v. Fischer.....	102 N. Y. 400..... 503
Englehorn v. Reitlinger.....	122 N. Y. 76..... 159
Erie R. R. Co. v. Steward.....	170 N. Y. 172..... 468, 471
Estate of McCunn.....	15 N. Y. S. R. 712..... 554
Excelsior Paving Co. v. Leach.....	84 Pac. Rep. 116..... 121
Ex parte Smith.....	8 McLean, 121 184
Exton v. Zule	14 N. J. Eq. 501..... 565, 569

F.

Farmers & Mechanics' Bank v. Butchers & Drovers' Bank....	16 N. Y. 135..... 265
Fenn v. Holme.....	62 U. S. 481... 415
Ferguson v. Crawford	70 N. Y. 253, 256... 553
Foley v. Wyeth	2 Allen, 131..... 6
Foote v. Lathrop.....	41 N. Y. 358, 361..... 553, 555
Ford v. Babcock.	2 Sandf. S. C. R. 518..... 502
Forsyth v. Kimball.....	91 U. S. 291 297
Fowler v. Hunt.....	10 Johns. 464..... 502
Francis v. Schoellkopf.....	53 N. Y. 152, 155..... 6, 12
French v. Davies.....	2 Ves. Ch. R. 572, 578..... 386
Fries v. N. Y. & Harlem R. R. Co.	169 N. Y. 270..... 21
Frishmuth v. Farmers' Loan & Trust Co.....	95 Fed. Rep. 5..... 536
Fuller v. Yates.....	8 Paige, 325..... 386
Furst v. Second Ave. R. R. Co.....	72 N. Y. 542..... 241

G.

Gall v. Gall.....	114 N. Y. 109..... 239
Garfield Nat. Bank v. Colwell.....	57 Hun, 169..... 302
Garvey v. L. I. R. R. Co.....	159 N. Y. 323... 6
George v. Surrey.....	1 Moody & Malkin (Eng.), 516.. 367
Gilkey v. Cook.....	60 Wis. 133. 431
Gillet v. Bank of America.....	160 N. Y. 549..... 353, 515
Gilliam v. Parkinson.....	4 Rand. (Va.) 325..... 363, 369
Gilman v. McArdle.....	99 N. Y. 451. 355

TABLE OF CASES CITED.

xvii

	PAGE.
Gilmore v. City of Utica.....	131 N. Y. 26..... 121
Gould v. Segee.....	5 Duer, 260..... 257
Graves v. L. S. & M. S. R. R. Co..	187 Mass. 83..... 641
Greeff v. Equitable L. Assur. Socy.	160 N. Y. 19..... 144
Green v. Collins.....	86 N. Y. 254..... 159
Greene v. Greene.....	125 N. Y. 506..... 358
Greene v. White.....	37 N. Y. 405, 407..... 243
Greenfield v. People.....	85 N. Y. 75, 88..... 228, 243
Griswold v. Haven.....	25 N. Y. 600..... 267

H.

Hagner v. Hall.....	10 App. Div. 581; 159 N. Y. 552.....	315
Hair v. State.....	16 Neb. 601, 605.....	152
Hale v. Finch.....	104 U. S. 261.....	534
Hall v. Gould.....	13 N. Y. 127.....	406
Hall v. Wilson.....	16 Barb. 548.....	255, 256, 257, 268
Hankinson v. Vantine.....	152 N. Y. 20, 29.....	66, 391, 392
Hannon v. Siegel-Cooper Co.....	167 N. Y. 244.....	518
Hart v. Kip.....	148 N. Y. 306.....	501
Hart v. Pennsylvania R. R. Co.....	112 U. S. 331.....	641
Hartman v. Aveline.....	63 Ind. 344.....	184, 192
Havens v. West Side El. L. & P. Co.....	49 N. Y. S. R. 771; 60 N. Y. S. R. 874.....	391, 392
Hecla Powder Co. v. Sigua Iron Co.	157 N. Y. 437, 441.....	101
Henderson v. N. Y. C. R. R. Co...	78 N. Y. 423.....	414, 418
Heywood v. City of Buffalo.....	14 N. Y. 534.....	48
Hibler v. State.....	43 Texas, 197.....	184
Higgins v. Ridgway.....	153 N. Y. 130.....	296, 302, 304
Hills v. Exchange Bank.....	105 U. S. 319.....	44
Hilton & Dodge Lumber Co. v. Murray.....	47 App. Div. 289.....	67
Hine v. N. Y. El. R. R. Co.....	128 N. Y. 571.....	12, 21
Hipp v. Babin.....	60 U. S. 271.....	415
Holdich v. Holdich.....	21 Eng. Ch. R. 17, 21.....	386
Hollins v. Brierfield C. & I. Co....	150 U. S. 371.....	415
Holmes v. Hubbard.....	60 N. Y. 183.....	452
Holmes v. Moffat.....	120 N. Y. 159.....	239
Holmes, Booth & Haydens v. Willard.....	125 N. Y. 75, 80.....	518
Hood v. Hood.....	85 N. Y. 578.....	553
Hope v. Lawrence.....	50 Barb. 259.....	267
Hornbostel v. Kinney.....	110 N. Y. 94, 99.....	531, 540
House v. Lockwood.....	137 N. Y. 259.....	341
House v. Walch.....	144 N. Y. 418.....	159
Howard v. Daly.....	61 N. Y. 362.....	409
Howell v. M'Coy.....	3 Rawle, 256.....	14
Hudson v. Caryl.....	44 N. Y. 553.....	415

	PAGE.
Hudson Canal Co. v. Pennsyl- vania Coal Co. }	8 Wall. 276 534
Hull v. Littauer	162 N. Y. 569, 572. 258
Hunt v. Hunt	72 N. Y. 217. 503
Hurtin v. Proal.	3 Brad. Surr. 414. 459
Husted v. Mathes.	77 N. Y. 388. 69
Huyck v. Andrews.	113 N. Y. 81. 158
Hymes v. Estey.	116 N. Y. 501, 509. 342

I.

Indig v. National City Bank.	80 N. Y. 100. 108, 109
In re Cook.	49 Fed. Rep. 833 184, 189
In re Jackson	2 Flippin, 183 184
In re Oliver Estate.	9 L. R. A. 421. 585
In re Small Estate.	151 Penn. St. 1 585
Irving Bank v. Wetherald.	86 N. Y. 335. 246
Ives v. Ellis.	169 N. Y. 85, 90 239

J.

Jackson v. Allen.	3 Cow. 226, 230. 406
Jackson v. Bailey.	2 Johns. 17 151
Jackson v. Jackson.	39 N. Y. 153, 160. 368
Jackson v. Van Dusen	5 Johns. 144, 155 367
Jackson v. Wood.	3 Wend. 37. 342
Jaynes v. Jaynes.	39 Hun, 40 444
Jenks v. Quinn.	137 N. Y. 223 158
Jermain v. L. S. & M. S. R. Co.	91 N. Y. 483, 492 144, 584
Jesser v. Gifford.	4 Burr. 2141 12, 21
Jones v. Chappell.	L. R. (20 Eq.) 539. 13
Jones v. Conde.	6 Johns. Ch. 77. 89
Jones v. Hough.	77 Ala. 437. 369
Jones v. Leonard.	50 Iowa, 106. 184, 192
Jones v. Menke.	168 N. Y. 61. 67
Jordan v. Van Epps.	85 N. Y. 427, 437 344
Juilliard v. Chaffee.	92 N. Y. 529, 534 302

K.

Kavanagh v. Barber	131 N. Y. 211. 23
Kearney v. Metropolitan El. Ry. Co.	129 N. Y. 76. 21
Keep & Hale v. Goodrich.	12 Johns. 397. 301
Kelley v. People.	55 N. Y. 565, 572 233
Kelly v. Kelly.	3 Barb. 419, 423. 278
Kelly v. West.	80 N. Y. 139. 564
Kennedy v. People.	39 N. Y. 245, 257. 230
Kent v. Quick Silver Mining Co.	78 N. Y. 179. 584
Ker v. Illinois.	119 U. S. 436. 181
Kernochan v. Manhattan Ry. Co.	161 N. Y. 339. 21

TABLE OF CASES CITED.

xix

	PAGE.
Kernochan v. N. Y. El. R. R. Co.	128 N. Y. 559, 568....6, 7, 9, 11, 13 15, 20
Keuka College v. Ray.....	167 N. Y. 96, 101..... 301
Keutgen v. Parks.....	2 Sandf. 60..... 255, 256
Kidgill v. Moon.....	9 C. B. 364..... 12, 21
Killian v. Ebbinghaus.....	110 U. S. 568..... 415
Koehler v. N. Y. El. R. R. Co.....	159 N. Y. 218, 228..... 413, 418
Konvalinka v. Schlegel.....	104 N. Y. 125, 129.. 30, 31, 32, 387
Kowing v. Manly.....	49 N. Y. 192, 203..... 367
Kujek v. Goldman.....	150 N. Y. 176, 180..... 444

L.

Lanergan v. People.....	39 N. Y. 39..... 233
Lansing v. Russell.....	3 Barb. Ch. Rep. 325..... 366
Lascelles v. Georgia.....	148 U. S. 537..... 181
Latham v. Vil. of Wilmette.....	168 Ill. 153..... 121, 122
Laude v. Chicago & N. W. R. Co..	33 Wis. 640..... 431
Lavin v. Emigrant Ind. Sav. Bank.	18 Blatchf. 1, 24..... 558
Lawrence v. Lawrence..	2 Ves. Ch. Rep. 572, 578. 386
Leader v. Moxon.....	3 Wils. 461..... 12, 21
Lees v. Whitcomb.....	2 Mo. & P. 86; 5 Bing. 34..... 301
Le Fevre v. Toole.....	84 N. Y. 95..... 33
Lewis v. Smith.....	9 N. Y. 502, 511.. 29, 384
Litchfield v. Flint.....	104 N. Y. 543..... 357
Livingston v. Hollenbeck.....	4 Barb. 9..... 48
Lopez v. Campbell.....	163 N. Y. 340..... 419
Lorillard v. Clyde.....	122 N. Y. 41.. 342, 345
Louisville & Nashville R. R. Co. }	177 U. S. 230..... 593
v. Schmidt.....	

M.

McAllister v. City of Tacoma.....	9 Wash. 272; 37 Pac. Rep. 447.. 121
McCluskey v. Cromwell.....	11 N. Y. 601..... 159
McCord v. Woodhull.....	27 How. Pr. 54..... 502
McLouth v. Hunt.....	154 N. Y. 179..... 141, 142, 145
McMurray v. Rawson.	3 Hill, 59, 68..... 278, 284
McNulty v. City of New York.....	168 N. Y. 117..... 320
Magee v. Badger.....	34 N. Y. 247..... 254
Magnin v. Dinsmore.....	70 N. Y. 410..... 641
Magoun v. Trust Co.....	170 U. S. 283..... 74
Mahon v. Justice.....	127 U. S. 700..... 181
Mahr v. Norwich U. F. Ins. Socy..	127 N. Y. 452, 459. 477
Manchester v. Braedner.....	107 N. Y. 346.. 500
Manice v. Manice.....	43 N. Y. 370..... 72
Mansfield v. N. Y. C. & H. R. R. }	102 N. Y. 205..... 532, 540
R. Co.....	
Marsh v. McNair.....	99 N. Y. 174..... 453

	PAGE.
Martin v. N. Y., N. H. & H. R. } R. Co.	108 N. Y. 626. 242
Matter of Brenner.....	170 N. Y. 185. 432, 433, 434
Matter of Bronson.....	150 N. Y. 1, 8. 144, 584
Matter of Carpenter.....	131 N. Y. 86. 355
Matter of Clark.....	9 Wend. 212. 207
Matter of Corwin.....	135 N. Y. 245. 42
Matter of Curtis.....	142 N. Y. 219. 77
Matter of Davis.....	149 N. Y. 539. 77
Matter of Dows.....	167 N. Y. 227. 74, 77
Matter of Equitable R. F. L. Assn.	181 N. Y. 354. 378, 512
Matter of Gibson.....	157 N. Y. 680. 77
Matter of Gorden.....	172 N. Y. 25. 384
Matter of Gould.....	156 N. Y. 423. 77
Matter of Graves.....	171 N. Y. 40. 614
Matter of Guden.....	171 N. Y. 529. 189
Matter of Hoffman.....	143 N. Y. 327. 77
Matter of Kernochan.....	104 N. Y. 618, 629. 144
Matter of Mahon v. Bd. of Edu- cation.....	171 N. Y. 263. 308
Matter of Mitchell.....	4 N. Y. Crim. Rep. 596. 185
Matter of Mohr.....	73 Ala. 503. 184, 192
Matter of Neilley.....	95 N. Y. 382. 16
Matter of N. Y. & Brooklyn Bridge.	72 N. Y. 530. 322
Matter of N. Y. Instn. for Deaf & Dumb.. ..	121 N. Y. 234. 44
Matter of Patterson.....	18 Hun. 221, 224. 380
Matter of Pell.....	171 N. Y. 48. 73, 79
Matter of Prime.....	136 N. Y. 347, 353. 431
Matter of Randall.....	152 N. Y. 508. 569
Matter of Reggel.	114 U. S. 642. 183
Matter of Roosevelt.....	143 N. Y. 120. 77
Matter of Seaman.....	147 N. Y. 72. 72
Matter of Vanderbilt.....	172 N. Y. 69. 610, 612, 615
Matter of Voorhees.....	32 N. J. L. 141. 184
Matter of Watson.....	171 N. Y. 256. 615
Matter of Zahrt.....	94 N. Y. 605, 609. 30, 32, 387
Melvin v. Whiting... ..	7 Pick. 79. 151
Merchants' Nat. Bank v. Sheehan.	101 N. Y. 176. 573
Messner v. People.....	45 N. Y. 1, 4. 231
Metropolitan Bd. of Health v. Heister.....	37 N. Y. 661. 436
Meux's Brewing Co. v. City of London El. L. Co.....	L. R. (1 Ch. 1895) 287. 12
Michaels v. Fishel.....	169 N. Y. 381, 387. 406
Milbank v. Jones.....	127 N. Y. 370. 320
Miles v. O'Hara.....	4 Binney, 111. 151

TABLE OF CASES CITED.

xxi

	PAGE.
Miller v. Crayton.....	3 T. & C. 360..... 256
Miller v. McKenzie.....	95 N. Y. 575..... 301
Moody v. Rowell.....	17 Pick. 490. 367
Moore v. Smedley.....	6 Johns. Ch. 28..... 48
Moore v. Taylor.....	42 Hun, 45. 408
Morgan v. Clayton.....	61 Ill. 35..... 158
Morse v. Morse.....	85 N. Y. 53..... 355
Morton v. Mayor, etc., of N. Y....	140 N. Y. 207..... 6, 23
Moss v. Cohen.....	158 N. Y. 240, 249..... 518
Mott v. Shoolbred.....	L. R. (20 Eq.) 22..... 21
Mumford v. Oxford W. & W. } Ry. Co.....	1 H. & N. (N. S.) 34..... 12
Myers v. Perigal.....	21 L. J. C. L. (Ct. Com. Pl.) 217. 585

N.

National Wall Paper Co. v. Sire...	163 N. Y. 122..... 67
Nellis v. Bellinger.....	6 Hun, 560..... 69
New v. Vil. of New Rochelle	158 N. Y. 43..... 419
New England Iron Co. v. Gilbert } El. R. R. Co.....	91 N. Y. 153..... 533, 540
N. Y. & N. H. R. R. Co. v. } Schuyler.....	34 N. Y. 58..... 264, 267
Nichols v. Scranton Steel Co.....	137 N. Y. 471..... 409
Niven v. Belknap	2 Johns. 589 .. 267
Northern Pacific R. R. Co. v. } Dustin.....	142 U. S. 492..... 95, 96
Norton v. Coons.....	6 N. Y. 33..... 294

O.

O'Brian v. Commonwealth.....	6 Bush (Ky.), 563, 571..... 152
Olmsted v. Rich	25 N. Y. S. R. 271, 275..... 419
Onondaga Co. Bank v. De Puy....	17 Wend. 47..... 267
Ornelas v. Ruiz	161 U. S. 502, 508..... 193, 207
Osburn v. City of Lyons.....	104 Iowa, 160..... 121
Osterhoudt v. Bd. Suprs. Ulster } Co	98 N. Y. 239, 243..... 476, 480
Ostrom v. Greene.....	161 N. Y. 353..... 393
Otis v. Dodd.....	90 N. Y. 336..... 67
Otten v. Manhattan Ry. Co.....	150 N. Y. 395, 400..... 420
Overing v. Foote.....	65 N. Y. 263, 269..... 315
Overseers of New Berlin v. Over- } seers of Norwich.....	10 Johns. 229..... 302

P.

Packet Co. v. Sickles.....	5 Wall. 592..... 342
Paisley v. Snipes.....	2 Brev. (S. C.) 200..... 367
Palmer v. Culbertson.....	143 N. Y. 213..... 164

	PAGE.
Pappenheim v. Metropolitan El. Ry. Co.	128 N. Y. 436 21
Parish v. N. Y. Produce Exchange.	169 N. Y. 34 494
Park v. White 23 Ont. 611.....	23
Payne v. Burnham.....	62 N. Y. 69 257
Pearson v. Pearson.....	2 Ves. Ch. Rep. 572, 578.... 385, 386
Peck v. Burwell.....	48 Hun, 471 301
Pegram v. N. Y. El. R. R. Co.....	147 N. Y. 135 414
Pennoyer v. Neff.....	95 U. S. 714, 733..... 558
Penruddock's Case.....	3 Coke, pt. 5, 101..... 10
People v. Albany & V. R. R. Co... ..	77 N. Y. 232 567
People v. Barrett & Ward.....	1 Johns. 66, 69..... 227
People v. Bodine.....	1 Denio, 281, 311..... 230
People v. Casborous.....	13 Johns. 351..... 227
People v. Cignarale.....	110 N. Y. 23, 29..... 227
People v. Commercial Alliance L. Ins. Co.....	154 N. Y. 95, 98..... 378
People v. Corey.....	148 N. Y. 476, 494 243
People v. Courtney.....	94 N. Y. 490 173
People v. Davis.....	56 N. Y. 95..... 243
People v. Dooley.....	171 N. Y. 74, 84 428
People v. Driscoll.....	107 N. Y. 414, 424 242
People v. Emerson.....	25 N. Y. S. R. 466..... 205
People v. Fielding.....	158 N. Y. 542 171
People v. Globe Mut. L. Ins. Co....	91 N. Y. 174, 179 377
People v. Goodwin.....	18 Johns. 187, 203 227
People v. Green .. .	13 Wend. 57..... 227
People v. Greenwall.....	108 N. Y. 296..... 243
People v. Helmer.....	154 N. Y. 596, 602 243
People v. Jackson.....	111 N. Y. 362, 369..... 205
People v. Koerner.....	154 N. Y. 355, 376..... 233, 243
People v. Molineux.....	168 N. Y. 264..... 173, 365
People v. Neufeld.....	165 N. Y. 43, 47..... 228
People v. Newman.....	5 Hill, 295..... 151
People v. N. Y., L. E. & W. R. R. Co.....	104 N. Y. 58..... 96, 97
People v. Olcott.....	2 Johns. Cas. 301, 306..... 227
People v. Penhollow .. .	42 Hun, 103..... 149
People v. Pinckney.....	32 N. Y. 382..... 435
People v. Priori.....	164 N. Y. 459, 469..... 239
People v. Raymond.....	37 N. Y. 428..... 435, 436
People v. Reagle.....	60 Barb. 527, 544..... 227
People v. Rector.....	19 Wend. 569, 574 230
People v. Robertson.....	3 Wheeler's Cr. Cas. 133..... 173
People v. Schooley.....	149 N. Y. 99, 103..... 239
People v. Security L. Ins. & Annuity Co.....	78 N. Y. 115..... 377

TABLE OF CASES CITED.

xxiii

	PAGE.
People v. Shaw.....	63 N. Y. 36..... 243
People v. Stocking.....	50 Barb. 573..... 205
People v. Strait.....	154 N. Y. 165, 171. 243
People v. Weaver.....	100 U. S. 539..... 49
People v. Wennerholm....	166 N. Y. 567, 573..... 228
People v. Willett.....	92 N. Y. 29..... 233
People v. Williams.....	35 Hun, 516..... 149
People v. Wood.....	126 N. Y. 249..... 243
People v. Wright.....	136 N. Y. 625, 629..... 231
People ex rel. Atty.-Genl. v. Life & R. Assn.....	150 N. Y. 94, 108..... 378, 512
People ex rel. Barnard v. Wemple.	117 N. Y. 77..... 313
People ex rel. Bolton v. Albertson.	55 N. Y. 50..... 426, 436
People ex rel. Brush v. Brown....	103 N. Y. 684..... 554
People ex rel. Buffalo & S. L. R. R. Co. v. Fredericks.....	48 Barb. 173; 48 N. Y. 70..... 40
People ex rel. Church of the Holy Communion v. Assessors.....	106 N. Y. 671..... 42
People ex rel. Citizens' G. L. Co. v. Bd. of Assessors.....	39 N. Y. 81, 88..... 40
People ex rel. Clapp. v. Bd. of Police.....	72 N. Y. 415..... 41
People ex rel. Cook v. Bd. of Police.	39 N. Y. 506..... 40
People ex rel. Draper v. Pinkerton..	77 N. Y. 245..... 191, 206
People ex rel. Hall v. Maher.....	56 Hun, 81..... 120
People ex rel. Inebriates' Home, etc., v. Comptroller, City of Brooklyn.....	152 N. Y. 399, 410..... 59
People ex rel. Jourdan v. Donohue.	84 N. Y. 438..... 191, 206
People ex rel. Lawrence v. Brady..	56 N. Y. 182..... 191, 195, 210
People ex rel. Loughran v. R. R. Comrs.....	158 N. Y. 421..... 98
People ex rel. Manhattan Ry. Co. v. Barker.....	152 N. Y. 417, 430..... 40, 41
People ex rel. Manhattan Ry. Co. v. Barker.....	165 N. Y. 330..... 598
People ex rel. N. Y. Instn. for Blind v. Fitch.....	154 N. Y. 14, 38..... 59
People ex rel. O'Connor v. Bd. Suprs. Queens Co.....	153 N. Y. 370, 374.. 128
People ex rel. P. Mfg. Co. v. Moore.	11 N. Y. S. R. 859..... 43
People ex rel. Platt v. Wemple....	117 N. Y. 146, 149..... 584
People ex rel. Reilly v. Johnson...	38 N. Y. 63..... 342
People ex rel. Rodgers v. Coler....	166 N. Y. 1..... 125, 126, 127
People ex rel. Steward v. R. R. Comrs.....	160 N. Y. 202..... 98
People ex rel. Taylor v. Dunlap...	66 N. Y. 162..... 428, 430

	PAGE.
People ex rel. Trustees, etc., v. Bd. Suprs. Queens Co. }	181 N. Y. 468..... 128
People ex rel. Tweed v. Liscomb...	60 N. Y. 560..... 190
People ex rel. Union Tr. Co. v. Coleman..... }	126 N. Y. 433..... 586
People ex rel. Wallkill Valley R. R. Co. v. Keator..... }	101 N. Y. 610..... 42
People ex rel. Warren v. Carter...	109 N. Y. 576..... 43
People ex rel. Winchester v. Coleman..... }	183 N. Y. 279. 579, 580
Peyser v. Wendt.....	87 N. Y. 323..... 477
Pitkin v. L. I. R. R. Co.	2 Barb. Ch. 221..... 158
Pitts v. Snowden.....	2 Ves. Ch. Rep. 572, 578..... 385
Platt v. N. Y. & S. B. Ry. Co.	170 N. Y. 451..... 570
Plimpton v. Bigelow.....	93 N. Y. 592..... 144
Porter v. Purdy.....	29 N. Y. 106..... 564
Potter v. Merchants' Bank.....	28 N. Y. 641..... 109
Potter v. Ogden.....	136 N. Y. 384..... 564
Powell v. Waters.....	17 Johns. 176..... 151
Pray v. Hegeman.....	98 N. Y. 351, 358..... 344
Pryor v. City of Rochester.....	166 N. Y. 548, 559..... 322
Pyke v. Crouch.....	1 Ld. Raym. 730..... 151

R.

Ramsdell v. Morgan.....	16 Wend. 574..... 255, 256
Read v. Bank of Attica.....	124 N. Y. 671..... 294, 297
Reed v. McCord.....	160 N. Y. 330, 341..... 236
Regina v. Firth.....	11 Cox C. C. 234..... 205
Regina v. Schlesinger.....	10 Add. & El. (N. R.) 670..... 173
Reich v. Cochran.....	151 N. Y. 122, 127..... 345
Reynolds v. Robinson.....	110 N. Y. 654..... 296, 302, 303
Reynolds v. Stockton.....	140 U. S. 254..... 342
Rice v. Culver.....	172 N. Y. 60..... 291, 393
Rice v. Rockefeller.....	134 N. Y. 174, 187..... 584
Rider Life Raft Co. v. Roach.....	97 N. Y. 378..... 518
Riggs v. Cragg.....	26 Hun. 89; 89 N. Y. 479..... 141
Ritter v. Mutual L. Ins. Co.....	169 U. S. 139..... 493
Robb v. Connolly.....	111 U. S. 624..... 188
Roberts v. Ely.....	113 N. Y. 123..... 16
Roberts v. Reilly..... }	116 U. S. 80..... 183, 188, 189, 198
	201, 207
Roderigas v. East River Sav. Instn..... }	63 N. Y. 460; 76 N. Y. 316 557
	558, 564
Ross v. Caywood.....	162 N. Y. 262..... 419
Rowell v. Janvrin.....	151 N. Y. 60..... 320, 321
Ryan v. Carter.....	93 U. S. 83..... 321

TABLE OF CASES CITED.

xxv

	S.	PAGE.
St. Nicholas Bank v. State Nat. Bank	123 N. Y. 26	107, 108
Salmon v. Gedney	75 N. Y. 481	574
Sanders v. Cooper	115 N. Y. 279	453
Sanders v. Soutter	126 N. Y. 193	570
Savage v. Burnham	17 N. Y. 561, 577.	29, 30, 32
Sawyer v. Chambers	43 Barb. 622	301
Schenck v. Dart	22 N. Y. 420	419
Schmittler v. Simon	114 N. Y. 176	302, 304
Schoonmaker v. Hoyt	148 N. Y. 425	452
Scott v. McNeal	154 U. S. 34	557
Scott v. Neely	140 U. S. 106	415
Seaboard Nat. Bank v. Woesten	147 Mo. 467; 48 L. R. A. 279	121
Seymour v. Cowing	1 Keyes, 532	296, 302, 303
Shank v. Smith	61 N. E. Rep. 932 (Ind.)	121
Sheldon H. B. Co. v. Eickemeyer	90 N. Y. 613	265
H. B. M. Co.		
Shelfer v. City of London El. L. Co.	L. R. (1 Ch. 1895) 287	12, 22
Shepard v. Manhattan Ry. Co.	169 N. Y. 160	21
Sherman v. Fall River Co.	2 Allen, 524	6
Sherman v. Parish	58 N. Y. 488	477
Shinkle v. Crock	17 Penn. St. 159	368
Simpson v. Moore	30 Barb. 637	141
Simpson v. Savage	1 C. B. (N. S.) 347	12
Smith v. Phillips	8 Phila. 10	14, 22
Smith v. Smith	79 N. Y. 634	345
Snebley v. Conner	78 N. Y. 218	574
Snyder v. Seaman	157 N. Y. 449	419
Specht v. Howard	16 Wall. 564	297
Spieries v. Parker	1 T. R. 141	321
Stanley v. Supervisors	121 U. S. 535	41, 49
Stannard v. Hubbell	123 N. Y. 520	341
Staples v. Fairchild	3 N. Y. 41	557, 564
State v. Able	65 Mo. 357	152
State v. Diskin	44 Am. Rep. 449	234
State v. Henderson	90 Ind. 408	173
State v. Johnson	12 Nev. 121, 123	152
State v. Knox	61 N. C. 312	173
State v. McNeil	33 La. Ann. 1332	152
State v. Taylor	Phil. (N. Car.) 508, 513	152
State v. Terry	30 Mo. 368	173
State of North Carolina v. Hall	28 L. R. A. 289	197
State of Tennessee v. Jackson	1 L. R. A. 370	200
Stebbins v. Kay	123 N. Y. 31, 35	312
Steck v. Colorado F. & I. Co.	142 N. Y. 236	232
Stephens v. Vroman	16 N. Y. 381	236

	PAGE.
Stokes v. People.....	53 N. Y. 164..... 243
Stokes v. Stokes.....	148 N. Y. 708..... 345
Stow v. Tift.....	15 Johns. 458..... 164
Stowell v. Greenwich Ins. Co.....	163 N. Y. 298, 305..... 294, 458
Strong v. Brewer.....	17 Ala. 706..... 367
Sullivan v. State.....	6 Tex. App. 319..... 152
Sumner v. Tileston.....	7 Pick. 198..... 13, 21, 23
Susquehanna F. Co. v. Malone.....	9 L. R. A. (Md.) 737..... 10
Suydam v. Jackson.....	54 N. Y. 450..... 65
Sweet v. Tuttle.....	14 N. Y. 465..... 342
Sykes v. Dixon.....	9 A. & E. 693; 1 Per. & D. 463.. 301

T.

Tallmadge v. East River Bank.....	26 N. Y. 105..... 164
Tebo v. Robinson.....	100 N. Y. 27..... 500
Terlinden v. Ames.....	184 U. S. 270, 278..... 207
Thomas v. Scutt.....	127 N. Y. 133, 138..... 159, 294
Thomas v. Western Car Co.....	149 U. S. 116..... 379
Thompson v. Ketcham.....	8 Johns. 190..... 294
Thompson v. R. R. Companies.....	73 U. S. 184..... 415
Thurber v. Harlem Bridge, M. & } F. R. R. Co..... }	60 N. Y. 326, 328..... 101
Tilton v. Beecher.....	59 N. Y. 176..... 574
Tipping v. St. Helen Smelting Co..	L. R. (1 Ch. App.) 66..... 10
Tobias v. Ketchum.....	32 N. Y. 319, 324.. 29, 31, 32, 33, 884
Tolman v. Syr., B. & N. Y. R. R. Co.	92 N. Y. 353..... 574
Travers v. Snyder.....	38 Ill. App. 382..... 369
Trustees, etc., of Brookhaven v. } Smith..... }	118 N. Y. 634..... 267
Tucker v. Woods.....	12 Johns. 190..... 301

U.

Union Dime Sav. Instn. v. Wilmot.	94 N. Y. 221..... 257
United Press v. N. Y. Press Co....	164 N. Y. 406..... 458
United States v. Dickson.....	15 Peters, 165..... 321
United States v. Maccomb.....	5 McLean, 286..... 151
Upton v. N. Y. & Erie Bank.....	13 Hun, 269, 273..... 380

V.

Valentine v. Richardt.....	126 N. Y. 272..... 413, 418
Van Aernam v. Bleistein.....	102 N. Y. 360..... 579
Van Allen v. N. Y. El. R. R. Co..	144 N. Y. 174..... 412, 418
Van Epps v. Van Dusen.....	4 Paige, 64..... 477
Van Fossen v. Clark.....	52 L. R. A. (Iowa) 279..... 10
Van Rensselaer v. Kidd.....	4 Barb. 19..... 48
Van Zandt v. Mut. Ben. L. Ins. Co.	55 N. Y. 169, 179..... 281
Vedder v. Vedder.....	1 Denio, 257..... 10, 14
Vernon v. Vernon.....	53 N. Y. 357, 361..... 29, 31, 384

TABLE OF CASES CITED.

xxvii

	PAGE.
Vil. of Champlain v. McCrea	165 N. Y. 264. 553
Villareal v. Lord Galway	2 Ves. Ch. Rep. 572, 578. 385, 386
Vosburgh v. Diefendorf.	119 N. Y. 857. 257, 267
Vosseller v. Slater.	25 App. Div. 368; 163 N. Y. 564. 66
	69, 391

W.

Wakeman v. Sherman	9 N. Y. 85. 500
Waldele v. N. Y. C. & H. R. R. R. Co.	95 N. Y. 274 242
Walsh v. Hartford F. Ins. Co.	73 N. Y. 10. 265
Walton v. Agricultural Ins. Co.	116 N. Y. 317. 453
Warner v. Durant.	76 N. Y. 183. 72
Waterbury v. Merchants' Un. Express Co.	50 Barb. 157, 161 584
Watts v. Kilburn.	7 Ga. 356. 369
Weaver v. Barden.	49 N. Y. 286. 582, 584
Western R. R. Co. v. Nolan.	48 N. Y. 513. 48
Westervelt v. Phelps.	171 N. Y. 212 818
Wetmore v. Porter.	92 N. Y. 76. 356
Wharton & Co. v. Winch.	140 N. Y. 287 408, 409
White v. Coatsworth.	6 N. Y. 137, 139. 344
White v. Kibling.	11 Johns. 128. 151
Whitehead v. Kennedy.	69 N. Y. 462, 468. 419
Whitney Arms Co. v. Barlow.	63 N. Y. 62. 518
Wilbur v. Selden.	6 Cow. 162. 151
Wilcox v. Nolze.	34 Ohio St. 520. 184, 192
Wilkinson v. First Nat. F. Ins. Co.	72 N. Y. 499. 486
Williams v. Brooklyn El. R. R. Co.	126 N. Y. 102, 103 175
Williams v. Tilt.	36 N. Y. 319. 256
Wilson v. City of Trenton.	60 N. J. L. 394; 61 N. J. L. 599. 121
	123
Wilson v. Mechanical OrguINETTE Co.	170 N. Y. 542. 506
Wilson v. Nations.	5 Yerger, 211 173
Winship v. Pitts.	3 Paige, 259 65
Witmark v. N. Y. El. R. R. Co.	149 N. Y. 393. 21
Wood v. Jackson.	8 Wend. 10 342
Woodgate v. Fleet.	44 N. Y. 1, 13. 341
Woodward v. James.	115 N. Y. 346. 355
Wride v. Clark.	2 Ves. Ch. Rep. 572, 578 386
Wright v. People.	1 N. Y. Crim. Rep. 462 233

Y.

Yoos v. City of Rochester.	92 Hun, 483 13
---------------------------------	--------------------------

Z.

Zimmer v. N. Y. C. & H. R. R. R. Co.	137 N. Y. 460 641
Zorkowski v. Astor.	156 N. Y. 398, 398 531, 540



TABLE OF CASES

AFFECTED BY DECISIONS REPORTED IN THIS VOLUME.

AFFIRMED.

	PAGE.
Baird v. N. Y. C. & H. R. R. R. Co. 64 App. Div. 14....	687
Berkery v. Erie R. R. Co.	55 App. Div. 489..... 686
Bermel v. N. Y., N. H. & H. R. } R. Co.	62 App. Div. 389..... 639
Binzen v. Epstein.....	58 App. Div. 304..... 596
Brewer v. Gilmore	57 App. Div. 637... 597
Busch v. Cummings.....	57 App. Div. 636..... 621
Carpenter v. Purvis.....	57 App. Div. 629..... 657
Chenango Valley Sav. Bank v. King. 66 App. Div. 616.....	636
Chesebro v. Corning.....	61 App. Div. 612..... 626
Clark v. Cliff Paper Co.....	55 App. Div. 625..... 624
Collins v. Fowler.....	62 App. Div. 614... 634
Cosselmon v. Dunfee.....	59 App. Div. 467..... 507
Curran Mfg. Co. v. Aultman & } Taylor Co.	62 App. Div. 201..... 628
Deuble v. Grand Lodge A. O. U. W. 66 App. Div. 323.....	665
Deuterman v. Gainsborg.....	54 App. Div. 575..... 595
Dorney v. O'Neill.....	60 App. Div. 19..... 595
Farley v. Howard.....	60 App. Div. 193..... 628
Fleisher v. Farmers' Loan & Trust } Co.	58 App. Div. 473.... 519
Fleitmann v. Ashley.....	60 App. Div. 201..... 628
Ginsburg v. Von Seggern.....	59 App. Div. 595..... 662
Gonorovsky v. Dry Dock, E. B. } & B. R. R. Co.	62 App. Div. 617... 625
Great Western Turnpike Co. v. } Shafer.....	57 App. Div. 331..... 662
Hamerslag v. Duryea	58 App. Div. 288..... 622
Hentz v. Havemeyer.....	58 App. Div. 36..... 597
Heyser v. Peterson.....	63 App. Div. 620..... 661
Hoeninghaus v. Holden.....	60 App. Div. 613..... 629
Home Bank v. Garver.....	58 App. Div. 618 ... 632
Hooker v. City of Rochester.....	57 App. Div. 580..... 665
Horstmann v. Flege.....	61 App. Div. 518..... 381
Jewell v. McIntyre.....	62 App. Div. 396..... 638
Kaiser v. British America Assur- } ance Co.	59 App. Div. 625..... 663

	PAGE.
Kaiser v. Fire Association of Philadelphia.....	59 App. Div. 625..... 664
Kaiser v. Hamburg-Bremen Fire Ins. Co.....	59 App. Div. 525..... 663
Kaiser v. Svea Assurance Co.....	59 App. Div. 625..... 664
Keegan v. Smith.....	60 App. Div. 168..... 624
Lillenthal v. Betz.....	61 App. Div. 601..... 643
Louis v. Connecticut Mut. L. Ins. Co.....	58 App. Div. 187..... 659
Lowry v. Collateral Loan Association.....	62 App. Div. 240..... 394
Lowry v. Collateral Loan Association.....	62 App. Div. 617..... 633
Lowry v. Farmers' Loan & Trust Co.....	56 App. Div. 408..... 137
McCready v. Lindenborn.....	63 App. Div. 106..... 400
McGuire v. Corey.....	63 App. Div. 619..... 637
Masons' Supplies Co. v. Jones.....	58 App. Div. 231..... 598
Matter of Baker.....	73 App. Div. 211..... 617
Matter of Bushnell.....	73 App. Div. 325..... 649
Matter of Chapman.....	72 App. Div. 629..... 620
Matter of Davenport.....	67 App. Div. 191..... 454
Matter of G. & J. Ry. Co. v. G. & S. El. R. R.....	75 App. Div. 220..... 462
Matter of Hamilton.....	70 App. Div. 73..... 652
Matter of Jerome Avenue.....	72 App. Div. 619..... 655
Matter of King.....	71 App. Div. 581..... 616
Matter of Ludlow Street.....	59 App. Div. 180..... 542
Matter of Newcomb.....	71 App. Div. 606..... 608
Matter of New York Juvenile Asylum.....	69 App. Div. 615..... 50
Matter of Rogers.....	71 App. Div. 461..... 617
Matter of Shaughnessy v. Fornes.....	73 App. Div. 462..... 323
Matter of Smith v. Mingey.....	72 App. Div. 103..... 650
Matter of Swales.....	60 App. Div. 599..... 651
Meislahn v. Irving Nat. Bank.....	62 App. Div. 231..... 631
Mercantile Nat. Bank v. Mayor, etc., of New York.....	50 App. Div. 628..... 35
Merchants' Nat. Bank v. Barnes.....	57 App. Div. 630..... 618
Mills v. Thomas Elevator Co.....	54 App. Div. 124..... 660
Morrow v. Westchester Electric Ry. Co.....	54 App. Div. 592..... 638
Mount Morris Bank v. Twenty-third Ward Bank.....	60 App. Div. 205..... 244
National Commercial Bank v. Lackawanna Transp. Co.....	59 App. Div. 270..... 596
Nat. Revere Bank v. Nat. Bank of Republic.....	54 App. Div. 342..... 103

TABLE OF CASES AFFECTED.

xxxi

	PAGE.
Niemoller v. Duncombe.....	59 App. Div. 614..... 621
N. Y. Milk Products Co. v. Damon.	57 App. Div. 261..... 661
Orvis v. Elmira, C. & N. R. R. Co..	17 App. Div. 187..... 656
Oswego Co. Sav. Bank v. Town of Genoa.....	68 App. Div. 330..... 635
People v. American Loan & Trust Co.....	70 App. Div. 579..... 371
People v. Bissert.....	71 App. Div. 118..... 643
People v. Doody.....	72 App. Div. 372.. .. 165
People v. Elliott.....	66 App. Div. 179..... 146
People ex rel. Batt v. West.....	66 App. Div. 617..... 619
People ex rel. Central Union Gas Co. v. Wells.....	73 App. Div. 626..... 607
People ex rel. Gleason v. Scannell.	69 App. Div. 400..... 316
People ex rel. Linton v. Brooklyn Heights R. R. Co.....	69 App. Div. 549..... 90
People ex rel. Weise v. Scannell...	44 App. Div. 642..... 607
People ex rel. Zollikoffer v. Feitner.	74 App. Div. 180..... 618
Playa de Oro Mining Co. v. Gage..	60 App. Div. 1..... 690
Prole v. Lowe.....	37 App. Div. 633.... 629
Quinn v. Baird.....	49 App. Div. 270..... 631
Ruichert v. Stilwell.....	57 App. Div. 480..... 88
Rhineland v. Farmers' Loan & Trust Co.....	58 App. Div. 619.. .. 519
Richards v. Stillman.....	57 App. Div. 182.. .. 632
Richardson v. Rhines.....	42 App. Div. 624..... 658
Schwaman v. Truax.....	53 App. Div. 626.. .. 658
Second Nat. Bank of Cortland v. Cole.....	45 App. Div. 629..... 657
Spink v. Corning.....	61 App. Div. 84..... 626
Spitzer v. Village of Fulton.....	61 App. Div. 612..... 285
Squiers v. Thompson.....	73 App. Div. 552..... 652
Stannard v. Whitestone F. & C. Co.....	61 App. Div. 622..... 627
Stevens v. Marcellus Electric R. R. Co.....	57 App. Div. 637..... 630
Stiasny v. Metropolitan Street Ry. Co.....	58 App. Div. 172..... 656
Tabernacle Baptist Church v. Fifth Ave. Baptist Church....	60 App. Div. 327..... 598
Te Bow v. Washington L. Ins. Co.....	59 App. Div. 310..... 623
Tilley v. Coykendall.....	69 App. Div. 92..... 587
Trust & Deposit Co. of Onondaga v. Verity.....	62 App. Div. 624..... 620
Utica City Nat. Bank v. Tallman..	63 App. Div. 480..... 642
Van Clief v. Jenkins.....	60 App. Div. 632.. .. 627

	PAGE.
Verity v. Sternberger.....	62 App. Div. 112..... 633
Wagner v. Buffalo & Rochester Transit Co.....	59 App. Div. 419..... 634
Weber v. Supreme Tent K. of M..	61 App. Div. 613..... 490
Weigley v. Kneeland.....	60 App. Div. 614..... 625
West v. Banigan.....	51 App. Div. 328..... 622
Ziegler v. Bailey.....	62 App. Div. 623..... 635

REVERSED.

Bank of Monongahela Valley v. Weston.....	62 App. Div. 623..... 259
Beck v. Catholic University.....	62 App. Div. 599..... 387
Bly v. Edison Electric Illuminat- ing Co.....	54 App. Div. 427..... 1
Collier v. Collins.....	58 App. Div. 550..... 99
Dady v. O' Rourke.....	61 App. Div. 529..... 447
Farrell v. City of Middletown....	56 App. Div. 525..... 666
Hoffman House v. Stokes.....	50 App. Div. 163..... 348
Jamestown Business College Assn. v. Allen.....	59 App. Div. 627..... 291
Matter of Allison v. Welde.....	72 App. Div. 629..... 421
Matter of Brez.....	69 App. Div. 619..... 609
Matter of Douglas v. Bd. of Supervisors.....	68 App. Div. 296..... 308
Matter of Hopkins.....	73 App. Div. 559..... 360
Matter of Jones.....	69 App. Div. 237..... 575
Matter of Killan.....	66 App. Div. 312..... 547
Ottaway v. Lowden.....	55 App. Div. 410..... 129
People v. Smith.....	Supreme Court, Monroe County, November 10, 1898..... 210
People ex rel. Corkran v. Hyatt...	72 App. Div. 629..... 176
People ex rel. Waddy v. Partridge.	74 App. Div. 620..... 305
Second Nat. Bank v. Weston.....	46 App. Div. 634..... 250
Servis v. Servis.....	64 App. Div. 612..... 438
Steinbach v. Prudential Ins. Co....	62 App. Div. 133..... 471
Stokes v. Stokes.....	49 App. Div. 302..... 327
Sullivan v. Prudential Ins. Co....	63 App. Div. 280..... 482
Uihlein v. Matthews.....	57 App. Div. 476..... 154
Vought v. Eastern Building & Loan Assn.....	61 App. Div. 613..... 508

MODIFIED.

Connecticut Trust & S. D. Co. v. Wead.....	58 App. Div. 493..... 497
McNulty v. Mt. Morris El. Light Co.....	56 App. Div. 9..... 410

TABLE OF CASES AFFECTED.

xxxiii

	PAGE.
Matter of Bassford v. Johnson.....	71 App. Div. 617..... 488
Matter of Gordon.....	68 App. Div. 388..... 25
Matter of Vanderbilt.....	68 App. Div. 27..... 69
Rice v. Culver.....	57 App. Div. 552..... 60
Van Siclen v. City of New York...	64 App. Div. 487..... 504

APPEAL DISMISSED.

Boyle & Everts Co. v. Fox....	72 App. Div. 617.....	604
City of Rochester v. Rochester } Bill Posting Co	70 App. Div. 623.....	603
Flaherty v. Murray.....	60 App. Div. 92.....	646
Frankenstein v. Hamburger.....	73 App. Div. 352.....	609
Holcomb v. Harris	41 App. Div. 617.....	660
Ingraham v. National Salt Co.....	72 App. Div. 582.....	644
Jacobson v. Smith.....	73 App. Div. 412.....	654
King v. King.....	73 App. Div. 547.....	604
Levy v. Schreyer.....	App. Div. 1st Dept., Nov. 11, 1898	606
McCann v. N. Y. & Queens Co. } Ry. Co	73 App. Div. 305.....	599
Malone v. Saints Peter and Paul's } Church.....	69 App. Div. 420.....	269
Matter of Delaware, L. & W. R. } R. Co.....	55 App. Div. 636.....	644
Matter of Goetz.....	71 App. Div. 272.....	608
Matter of Mayor, etc., of New York.	74 App. Div. 348.....	653
Matter of Union Trust Co.....	70 App. Div. 5.....	494
Moeller v. Delaware, L. & W. R. } R. Co.....	55 App. Div. 636.....	644
Murphy v. Supreme Council C. } M. B. A.	51 App. Div. 618.....	659
Peggo v. Dinan.....	72 App. Div. 434.....	605
People ex rel. Clifford v. York.....	60 App. Div. 630.....	650
People ex rel. Newland v. Lederle.	74 App. Div. 631.....	653
People ex rel. North v. Feather- } stonhaugh.....	67 App. Div. 625.....	113
Sanford v. Wagner....	71 App. Div. 617.....	605
Weiant v. Rockland Lake Trap } Rock Co.....	61 App. Div. 883.....	600

APPEAL WITHDRAWN.

Keller v. Lee.....	66 App. Div. 184.....	606
--------------------	-----------------------	-----

MOTION TO DISMISS APPEAL DENIED.

Adams v. Elwood.....	72 App. Div. 632.....	603
Dimon v. N. Y. C. & H. R. R. R. Co.	74 App. Div. 626.....	602

		PAGE.
Flaherty v. Cary.....	62 App. Div. 116.....	646
Goldmark v. Magnolia Anti-Fric- tion Metal Co.....	} 71 App. Div. 617.....	645
Hawe v. N. Y., Westchester & Connecticut Traction Co.....		
Kalish v. Higgins.....	70 App. Div. 192.....	647
Kalish v. Higgins.....	70 App. Div. 618.....	647
Phoenix Nat. Bank v. Keim.....	69 App. Div. 201.....	602
Weiant v. Rockland Lake Trap Rock Co.....	} 61 App. Div. 383.....	645
Zapf v. Carter.....		
	70 App. Div. 395.....	666

TABLE OF CASES

DISTINGUISHED, ETC., IN OPINIONS REPORTED IN THIS VOLUME.

	PAGE.
Adams v. People.....	1 N. Y. 178, explained..... 185
Beedle v. Bennett.....	122 U. S. 71, not followed..... 415
Clark v. Wooster.....	119 U. S. 825, not followed 415
Engel v. Fischer.....	102 N. Y. 400, distinguished.... 508
Erie R. R. Co. v. Steward.....	170 N. Y. 172, distinguished 488
Hall v. Wilson....	16 Barb. 548, questioned... 255, 268
Henderson v. N. Y. C. R. R. Co....	78 N. Y. 423, distinguished..... 414
Holmes v. Hubbard.....	60 N. Y. 183, approved 452
Indig v. National City Bank.....	80 N. Y. 100, distinguished..... 108
Keutgen v. Parks.....	2 Sandf. 60, questioned..... 255
Koehler v. N. Y. El. R. R. Co.....	159 N. Y. 218, distinguished.... 413
Lansing v. Russell.....	3 Barb. Ch. Rep. 325, distin- guished..... 367
Louisville & N. R. R. Co. v. Schmidt.	177 U. S. 230, distinguished.... 593
Matter of Brenner.....	170 N. Y. 185, distinguished.... 432
Matter of Zahrt.....	94 N. Y. 605, distinguished..... 387
National Wall Paper Co. v. Sire....	163 N. Y. 122, distinguished.... 67
Pegram v. N. Y. El. R. R. Co.....	147 N. Y. 135, distinguished.... 414
People v. Dooley.....	171 N. Y. 74, approved..... 428
People ex rel. Taylor v. Dunlap....	66 N. Y. 162, approved..... 428
Ramsdell v. Morgan.....	16 Wend. 574, questioned..... 255
Staples v. Fairchild.....	3 N. Y. 44, approved..... 557
Valentine v. Richardt.....	126 N. Y. 272, distinguished.... 413
Van Allen v. N. Y. El. R. R. Co....	144 N. Y. 174, distinguished.... 412

CASES DECIDED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,
COMMENCING OCTOBER 7, 1902.

**SARAH A. BLY, Appellant, v. THE EDISON ELECTRIC ILLU-
 MINATING COMPANY OF NEW YORK, Respondent.**

172	1
172	506

**LANDLORD AND TENANT—LEASING PREMISES WITH KNOWLEDGE OF
 EXISTING NUISANCE. — TENANT'S RIGHT OF ACTION FOR DAMAGES.** A
 tenant in possession of premises affected by a nuisance under a lease made
 during the existence of the nuisance, which in this case consisted of the
 operation of an electric lighting plant, can maintain an action to abate the
 nuisance and to recover the damages which he may have sustained by
 reason thereof.

Bly v. Edison Electric Illuminating Co., 54 App. Div. 427, reversed.

(Argued May 23, 1902; decided October 7, 1902.)

APPEAL from a judgment of the Appellate Division of the
 Supreme Court in the first judicial department, entered
 February 4, 1901, modifying, and affirming as modified, a
 judgment in favor of plaintiff entered upon a decision of the
 court on trial at Special Term.

The nature of the action and the facts, so far as material,
 are stated in the opinion.

Frank M. Hardenbrook for appellant. The reduction of
 plaintiff's damages was erroneous. (*Kernochan v. N. Y. El.
 R. R. Co.*, 128 N. Y. 575; *Stowers v. Gilbert*, 156 N. Y.
 601; *Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98;

Pond v. M. El. R. Co., 112 N. Y. 186; *Ottenot v. N. Y., L. & W. R. R. Co.*, 119 N. Y. 603; *Field on Dam.* 602, 603, § 748; *Brown v. C. & S. N. R. Co.*, 12 N. Y. 492; *Brady v. Weeks*, 3 Barb. 157; *Sperb v. M. E. R. Co.*, 137 N. Y. 155; *Hine v. N. Y. E. R. R. Co.*, 128 N. Y. 574.) The judgment of the Special Term should be affirmed. (*Heller v. Cohen*, 154 N. Y. 299; *Benedict v. Arnoux*, 154 N. Y. 175; *Queen v. Weaver*, 166 N. Y. 398; *Van Beuren v. Wother-spoon*, 164 N. Y. 368; *Snyder v. Seaman*, 157 N. Y. 449; *Hershfeld v. Fitzgerald*, 157 N. Y. 166; *Ross v. Caywood*, 162 N. Y. 262.) The actual losses the plaintiff could show she had sustained by reason of the defendant's acts are her damages. (*Jutte v. Hughes*, 67 N. Y. 267.) Damages may be assessed for annoyance and personal discomfort. (*Randolf v. Bloomfield*, 77 Iowa, 50; *Brady v. Weeks*, 3 Barb. 157; *Wood on Nuisances*, § 866; 5 Am. & Eng. Ency. of Law, 38, § 9; *Brown v. Railroad Co.*, 80 Mo. 157; *Pierce v. Wagner*, 29 Minn. 210, 355; *Emery v. Lowell*, 109 Mass. 201; *Kearney v. Farrell*, 28 Conn. 320.) The fact that the discomfort arising from the nuisance or the actual tangible injury to property itself therefrom is in no measure commensurate with the pecuniary loss to the owner of the works producing the injury by having his works declared a nuisance, is entitled to no weight in a court of law. (1 *Wood on Nuisances* [3d ed.], 766, § 512; *Pike v. Doyle*, 19 La. Ann. 362; *C., etc., R. R. Co. v. Flagg*, 43 Ill. 364; *Ives v. Humphrey*, 1 E. D. Smith, 196; *Scott v. Montgomery*, 95 Penn. St. 444; *Pierce v. Dart*, 7 Cow. 509; *B. & P. R. R. Co. v. F. B. Church*, 108 U. S. 317; *Cogswell v. N. Y. & N. H. R. R. Co.*, 103 N. Y. 25; *Bohan v. P. J. G. L. Co.*, 122 N. Y. 23; *F. B. Church v. S. & T. R. R. Co.*, 5 Barb. 79.) Plaintiff's right to damages and an injunction is unquestionable. (*Wood on Nuisances*, 837, § 624; *Elliotson v. Feethan*, 2 Bing. [N. C.] 134; *Booth v. R. & O. T. R. R. Co.*, 140 N. Y. 277; *Fish v. Dodge*, 4 Den. 311; *Bohan v. P. J. G. L. Co.*, 122 N. Y. 18; *Puch v. Geoffroy*, 67 Hun, 401; *Kobbe v. Vil. of New Brighton*, 23 App. Div. 243;

Cogswell v. N. Y. & N. H. R. R. Co., 103 N. Y. 10; *Campbell v. Seaman*, 63 N. Y. 568.) The nuisances complained of are not the incidents due to city life. (*Yocum v. Hotel*, 18 Abb. [N. C.] 340.) The public character of the defendant's business in no manner constitutes a defense to the plaintiff's demands. (*Bohan v. P. J. G. L. Co.*, 122 N. Y. 18; *Garvey v. L. I. R. R. Co.*, 159 N. Y. 353; *Springs v. D., L. & W. R. R. Co.*, 88 Hun, 385; *Morton v. Mayor, etc.*, 140 N. Y. 207; *Cogswell v. N. Y. & N. H. R. R. Co.*, 103 N. Y. 10; *Rosenheimer v. S. G. Co.*, 36 App. Div. 1; 39 App. Div. 482.)

Henry J. Hemmens and *Samuel A. Beardsley* for respondent. The reduction by the Appellate Division of plaintiff's damages from four thousand dollars to six cents was proper and legal. (*Rosenheimer v. S. G. L. Co.*, 36 App. Div. 1; *Francis v. Schoellkopf*, 53 N. Y. 152; *Kernochan v. N. Y. El. R. R. Co.*, 128 N. Y. 559; *Hussner v. B. C. R. R. Co.*, 114 N. Y. 433; *Fries v. H. R. R. Co.*, 169 N. Y. 270, 280; *Morton v. Mayor, etc.*, 140 N. Y. 207; *Lester v. Mayor, etc.*, 79 Hun, 479; *Riedeman v. M. M. E. L. Co.*, 56 App. Div. 23; *Baker v. Sanderson*, 3 Pick. 348; *Summer v. Tileston*, 7 Pick. 198; *Leader v. Moxon*, 3 Wils. 461.) The plaintiff was not entitled to recover damages for any period previous to six years before the commencement of the action. (*Matter of Neilly*, 95 N. Y. 382; *Roberts v. Ely*, 113 N. Y. 128; *Yates v. Wing*, 42 App. Div. 356; *Butler v. Johnson*, 111 N. Y. 204; *Cornell v. El. Ry. Co.*, 37 N. Y. S. R. 624; *Kearney v. E. R. Co.*, 14 N. Y. S. R. 854; *Colrick v. Swinburne*, 105 N. Y. 503; *Hamilton v. M. R. Co.*, 26 J. & S. 22; *Wood on Lim.* [3d ed.] 180; *Gucker v. M. Ry. Co.*, 38 App. Div. 48.) The decision of the Appellate Division was right and should be sustained. (*Holland House v. Baird*, 169 N. Y. 136; *Tucker v. M. P. Co.*, 61 App. Div. 521; *Riedeman v. M. M. E. L. Co.*, 56 App. Div. 23; *R. L. Co. v. S. S. Co.*, 62 App. Div. 421; *Booth v. R., W. & O. T. R. R. Co.*, 140 N. Y. 267.)

WERNER, J. The principal question presented on this appeal is, whether a tenant in possession of premises affected by a nuisance, under a lease made during the existence of the nuisance, can maintain an action to abate the same and to recover his damages occasioned thereby. This question cannot be intelligently discussed without a short review of the history of the case.

In 1886 the plaintiff went into occupation of the premises No. 33 West Twenty-sixth street in the city of New York, under a lease which expired May 1st, 1890. In the fall of 1888 the defendant established an electric light plant on the same street and about one hundred and seventy-five feet distant from the plaintiff's dwelling. At the expiration of plaintiff's first lease she took another lease for three years. Then she took leases from year to year until May 1st, 1897, at which time she took a lease from a new owner of the premises for a term of three years. During the terms of all of these leases the defendant operated its electric light station. In December, 1898, which was more than twelve years after plaintiff had taken her first lease, and about ten years after the establishment of defendant's electric light station, this action was commenced. The complaint charged that the electric light station, as operated by the defendant, was a nuisance, and the learned trial court found "that smoke and cinders are emitted from the premises of the defendant and that great quantities of this smoke and cinders fall upon plaintiff's premises; that the jar and vibration caused by the running of the defendant's machinery are of such an extent and nature as to interfere seriously with plaintiff's enjoyment of her premises, and that the plaintiff has been damaged to a considerable extent and is being damaged by the aforesaid acts of the defendant. * * * That the aforesaid acts have prevented the plaintiff from renting the rooms of her house, have injured her furniture and household effects and have caused her an expense for laundry work." Upon these findings the trial court decided that the plaintiff was entitled to \$4,000 damages and to an injunction "enjoining and restraining the

defendant from so conducting its business on the premises, mentioned and described in the complaint, as to constitute a nuisance in the respects before mentioned as against the plaintiff."

Upon defendant's appeal to the Appellate Division, that learned court modified the judgment entered upon the decision of the trial court by reducing the damage to six cents and vacating the injunction. The plaintiff, who is the appellant in this action, does not complain because the injunction was vacated, for it is conceded that at the time of the argument in the Appellate Division the plaintiff's last lease had expired and she had vacated the premises, so that there was no longer any necessity for an injunction. It is claimed, however, that the modification of the judgment, in respect to the damages awarded, was illegal and erroneous. This claim is met by the defendant's contention that the plaintiff, as tenant under a lease which was made during the existence of the nuisance, is entitled to no damages whatever. If it is true that a tenant who "comes to a nuisance" has no remedy for the damages which he may suffer by reason thereof, then it must be conceded that the plaintiff has no cause for complaint and that the learned Appellate Division has dealt more leniently with her than she deserved, for in that event the judgment of the trial court should have been reversed altogether, and judgment absolute rendered in favor of the defendant.

We are inclined to the view that the learned Appellate Division erred in modifying the judgment as stated. The plaintiff was either entitled to such substantial damages as she had been able to establish by her proofs, or she was not entitled to any thing. This is not a case in which the plaintiff has established a good cause of action but has failed in her proof of damages; on the contrary, it is clearly a case in which the only reason there can be for withholding such actual damages as she may be able to establish, is that she has no cause of action.

Before proceeding to discuss the question whether the plaintiff has a cause of action let us first fix the point of view

from which it must be considered, and to that end we will briefly state a few propositions from which there can be no dissent. 1. The trial court has found that defendant's electric light station, as operated during the time set forth in the complaint, was a nuisance as to the plaintiff. The decision was in the short form and was, therefore, in effect a general verdict. (*Amherst College v. Ritch*, 151 N. Y. 282.) The affirmance by the Appellate Division, of the judgment entered upon that decision, establishes the facts for the purpose of this appeal and the pivotal fact in the case is that the nuisance complained of by the plaintiff existed. 2. The public character of defendant's business does not entitle it to maintain a nuisance. (*Bohan v. Port Jervis Gas Light Co.*, 122 N. Y. 18; *Garvey v. L. I. R. R. Co.*, 159 N. Y. 323; *Morton v. Mayor, etc., of N. Y.*, 140 N. Y. 207; *Cogswell v. N. Y., N. H. & H. R. R. Co.*, 103 N. Y. 10.) 3. Had the plaintiff commenced an action during the continuance of her first lease, or at any time within six years thereafter, she would have been clearly entitled to recover such damages to her possessory rights under that lease as she could have proved. (*Kernochan v. N. Y. E. R. R. Co.*, 128 N. Y. 568; *Francis v. Schoellkopf*, 53 N. Y. 152; *Sherman v. Fall River Co.*, 2 Allen, 524; *Foley v. Wyeth*, 2 Allen, 131.)

In the light of these preliminary considerations we come to the real question in the case. If the plaintiff could have maintained an action under her first lease which antedated the nuisance, why can she not maintain an action under leases made during the existence of the nuisance? The acts complained of are no less a nuisance in the one case than in the other, nor are they any more excusable or justifiable by the character of the defendant's business. It is contended by the defendant that the difference between the two cases lies in the fact that in the former the rent paid by the tenant is supposed to represent the value of the premises free from the nuisance, while in the latter it is presumed to have been fixed according to their diminished value on account of the existing nuisance. This view was

N. Y. Rep.] Opinion of the Court, per WERNER, J.

adopted by the learned Appellate Division on the authority of *Kernochan v. N. Y. E. R. R. Co. (supra)*. We think the *Kernochan* case has no application to a case like the one at bar, and this without reference to the fact that it appears affirmatively that the rental paid by the plaintiff was the same during the existence of the nuisance as it was before. The elevated railroad cases, to which class the *Kernochan* case belongs, are *sui generis*. They are governed by principles which apply to no other class of cases. The wrongful acts for which the elevated railroad companies, operating in the city of New York, have been held liable, are technically neither nuisances nor trespasses. They may more correctly be described as wrongful appropriations of the easements which are an integral part of the property of adjoining owners. These wrongful acts, although an invasion of the rights of such owners, were not trespasses, because there was no physical entry or intrusion upon their lands, and this for the reason that the ownership of the fee in the streets upon which the elevated railroads were built was in the municipality and not in the adjoining owners. There was no nuisance, in the legal signification of that term, because the railroad companies were expressly authorized by legislative enactment to occupy the streets for that purpose. This express right was coupled with the power of eminent domain so that these corporations could acquire, in condemnation proceedings, the easements of adjoining owners which it might be necessary to destroy or appropriate. The appropriation and destruction of such easements by said corporations, without resort to condemnation proceedings, led to the so-called elevated railroad litigation, which for immensity of volume and variety and difficulty of questions involved, has no parallel in our jurisprudence. The principal question in the *Kernochan Case* (128 N. Y. 568) was whether the owner of premises abutting upon a street in which an elevated railroad was constructed, who after such construction leased them for a term of years, could maintain an action for the impairment of his easements in such street, by the construction and operation of

such railroad. This question was answered in the affirmative and, in discussing it, Judge ANDREWS, who spoke for the court, very clearly shows the reason for the rule adopted. The easements invaded and appropriated were incorporeal hereditaments forming an integral part of the owner's estate, which could not be permanently severed from the dominant or principal estate without an injury to the inheritance and, as the wrongful act of the railroad company was not a mere casual wrong but an avowedly permanent appropriation of the easements, it was as much or more of a loss to the reversioner as it might be to a tenant in possession. But, beyond this, there was the knowledge of owner and intending tenant that here was a great structure, more permanent in its character than many of the buildings abutting upon its course, and built under a charter which not only insured its permanency, but its absolute right to acquire the easements which before had belonged to the adjoining owners, and had been enjoyed by the occupants of buildings along its line. It was obvious to every one who desired a lease of premises on a street traversed by the elevated railroad, that the structure was there and there to stay. It was perfectly apparent that the easements taken away by the railroad could not be enjoyed in connection with the property from which they had been severed. Under these conditions it was natural, and, in view of the almost endless volume of the elevated railroad litigation, it may have been deemed necessary, for this court to say: "But still more material is the fact that the rent reserved in the lease was for the use of the lot in its actual situation. This is not stated in terms, but there can be no other reasonable inference. The road was then in the street and was intended to be a permanent structure. It would be an unnatural and violent presumption that the lessor intended to pay rent, measured by the value of the use of the whole of the premises without the railroad, on the supposition that it would be removed during the term. On the contrary, it is undoubtedly true that the rent reserved in leases like this represents in the minds of the parties the value of the use of the premises incumbered by the railroad.

The rent is diminished to the extent of the estimated injury from this cause to the rental value of the premises. In no other view practically could property be built upon, and especially business property, be rented at all. Lessees usually desire leases of such property for a considerable period. The owner could not ordinarily rent from day to day or week to week. The loss falls upon the lessor, and the continuance of the wrong during the term imposes no pecuniary loss upon the lessee. To hold that the right of action vests in the lessee, or to divide the claim between the owners of the two estates, would be contrary to equity and to the presumed intention of the parties." Much more might be quoted from the opinion in the *Kernochan* case to show that its learned author was writing to meet a condition that was unique and difficult, and to relieve which no rule was to be found in the general law relating to the subjects of trespass and nuisance.

Here we have a different situation than was presented in that case. The defendant is a corporation organized for the purpose of producing and selling electric light. While it serves the public in that way it is none the less a strictly private corporation. The trial court has decided that the defendant has so operated its electric light station as to constitute a nuisance against the plaintiff. And what is a nuisance? It is an unreasonable, unwarrantable or unlawful use of one's own property to the annoyance, inconvenience, discomfort or damage of another. It is not, as in the *Kernochan* case, a technical wrong which can be transformed into a right by the proper legal procedure, but a positive, naked wrong, each repetition of which constitutes a fresh offense with its separate legal remedy. In theory of law a nuisance is not only never presumed to be permanent, but, on the contrary, each repetition thereof is deemed a new nuisance, to redress which the aggrieved party may institute as many actions at law as may be necessary for that purpose. As there are various degrees of nuisances, so there are different kinds. Some may permanently injure the real property contiguous thereto; others may affect the present right of occupancy

and the reversion together; still others may curtail or destroy the right of occupancy alone. In the case at bar we are not advised as to the effect of the nuisance upon the owner's reversion, but there is evidence from which the trial court has found that the plaintiff's right of occupancy has been impaired, and that her own personal effects have been injured to her substantial damage. This was not an injury for which the owner of the reversion could sue. If there was any right of action it belonged to the plaintiff. The injury to her right of occupancy was as separate and distinct from any injury to the reversion as the injury to her furniture and household belongings. During the term of the lease the premises belonged to the plaintiff, and the owner had no rights therein except such as were expressly reserved in the lease, or such as reverted to him after its expiration. It goes without saying that if the nuisance created by the defendant had permanently injured the premises occupied by the plaintiff the owner would have a right of action. In such a case the defendant could not be heard to urge the public and permanent character of its business or buildings as a defense, for that would be simply pleading its own wrong in justification of the destruction of the property of others without compensation. Since the defendant is not vested with the power of eminent domain, it is equally clear that it has no right to take or destroy the property of adjoining owners at all. As affecting the rights of owners whose property is injured by a nuisance, all this is as true of titles which are acquired during the continuance of the nuisance as of those which antedate it. (*Befwick v. Cunden*, Cro. Eliz. 402; *Penruddock's Case*, 3 Coke, pt. 5, 101; *Tipping v. St. Helen's Smelting Co.*, L. R. [1 Ch. App.] 66; *Alexander v. Kerr*, 2 Rawle, 83; *Susquehanna Fertilizer Co. v. Malone*, [Md.] 9 L. R. A. 737; *Van Fossen v. Clark*, [Iowa] 52 L. R. A. 279; *Vedder v. Vedder*, 1 Denio, 257; *Campbell v. Seaman*, 63 N. Y. 568.) If the act complained of is a nuisance, it is a wrong, the existence of which cannot be justified at any time as against any one injuriously affected thereby. If this is the rule, is it any less applicable

N. Y. Rep.] Opinion of the Court, per WERNER, J.

in favor of tenants, whose term begins during the continuance of the nuisance than in favor of subsequent owners? The only case cited as authority for holding that it is applicable in the one case and not in the other is the *Kernochan Case (supra)*, and, as we have endeavored to show, that case rests upon distinct principles which have no application to the law of nuisances. If the principle of the elevated railroad cases is to be applied to electric light stations, where shall we stop? Can we say that an electric light plant, housed in a costly and substantial building, is so permanent that the rentals in its neighborhood must be presumed to have been fixed with reference to its existence in the same breath that we may hold a livery stable, or a slaughter house, or a soap factory to be a nuisance, regardless of the character of the buildings in which the latter may be carried on? The answer seems obvious. If a business is conducted in such a manner as to become a nuisance to those in the neighborhood, the cost or permanence of the building in which it is carried on cannot affect the right of those injured thereby to have the nuisance abated or to recover damages for injuries actually sustained. Logically there can be no more reason for denying such a right of action to a tenant who "comes to the nuisance" than there can be for withholding it from the tenant whose occupancy precedes the nuisance. There can be no presumption that a wrong, which may in fact be merely temporary, will be permanent. Of course it may be permanent so long as no fault is found, but in a case like the one at bar, where the nuisance grows out of the method of operation rather than the character of the business or the structure in which it is carried on, the presumption, if any, is and should be that it is merely casual and temporary, and not permanent. If it is casual and temporary then there is no reason why the landlord or owner should have a right of action for the injury which is in fact suffered by his tenant, and by him alone.

Let us now see what the authorities have to say upon the subject. The English cases cited in the opinion in the *Kernochan Case (supra)* are all cases in which there was an injury

to the reversion, and this is the principle upon which the owners of the premises affected by the nuisance were held to be entitled to maintain actions. (*Jesser v. Gifford*, 4 Burr. 2141; *Leader v. Moxon*, 3 Wils. 461; *Bedingsfield v. Onslow*, 3 Lev. 209; *Clowes v. Staffordshire Potteries W. W. Co.*, L. R. [8 Ch. App.] 125; *Kidgill v. Moor*, 9 C. B. 364; *Bell v. Midland Ry. Co.*, 10 C. B. [N. S.] 287.) In the following English cases it was held that only the tenant can sue for a casual or temporary nuisance which is an injury to his right of possession but not to the reversion: *Mumford v. Oxford W. & W. Ry. Co.* (1 H. & N. [N. S.] 34); *Simpson v. Savage* (1 C. B. [N. S.] 347); *Jones v. Chappell* (L. R. [20 Eq.] 539); *Shelfer v. City of London Electric Lighting Co.*, and *Meux's Brewery Co. v. Same* (L. R. [1 Ch. 1895] 287.)

There are other English cases in which it has been held that the lessee and reversioner may each have an action for injuries resulting from the same wrong, each with respect to his particular estate, of which *Bedingsfield v. Onslow* (3 Lev. 209) is an example, cited with approval in *Kernochan's Case* (*supra*), and there is a dictum to the same effect in *Hine v. N. Y. E. R. R. Co.* (128 N. Y. 571). In this state we have held that the owner of premises affected by a nuisance may recover his damages occasioned thereby although he does not himself occupy the premises. (*Hine v. N. Y. E. R. R. Co.*, *supra*; *Francis v. Schoellkopf*, 53 N. Y. 155.) But in the latter case the plaintiff's recovery was expressly limited to the rent for the time that the house was vacant and to the diminution of the rent while she succeeded in obtaining a tenant, thus recognizing, by implication, the existence of a separate right to damages in the tenant. In Massachusetts, in an action on the case for obstructing plaintiff's mills, defendant's counsel contended that the plaintiff, as owner, could not recover damages because, during the time covered by the alleged nuisance, the mills were in the possession of sundry tenants, to whom the defendant would still be liable for the damages occasioned by the alleged nuisance during their respective terms, notwithstanding a recovery by the plaintiff as owner. To this the

Supreme Judicial Court said: "This objection would have been insuperable, had it not been alleged that the plaintiff, in consequence of the obstructions complained of, had reduced his rents, at the request of the tenants, they threatening to quit unless he would agree to a fair reduction; that he did so agree and that the tenants were satisfied with the reduction made. After such an agreement they could not maintain an action against the defendant for damages occasioned by the obstructions complained of. That agreement and the plaintiff's recovery in this case will be a good bar to any action that may be brought in the names of the tenants." (*Baker v. Sanderson*, 3 Pick. 352.) To the same effect is *Sumner v. Tileston* (7 Pick. 198), and in this state the case of *Yoon v. City of Rochester* (92 Hun, 483) falls within the same category.

Several propositions seem to be quite satisfactorily established, therefore, both upon principle and by authority. 1. That an owner of property affected by a nuisance may maintain an action to recover his damages, or to abate the nuisance, or both, no matter whether he takes his title before or after the introduction of the nuisance. 2. That a landlord and his tenant have separate estates for injuries to which each may have his appropriate remedy. If then, an owner, who "comes to a nuisance," can maintain an action to redress his wrongs, why should a tenant who "comes to a nuisance" be denied any remedy? The last owner or occupant, when he acquires his property or possession, acquires with it all the rights which by law belong to it, and exemption from wrongful injury by a contiguous proprietor is one of them. A man may, by an uninterrupted user of twenty years, acquire, as against individuals, rights which he cannot acquire against the public. He may, as against individuals, acquire during that period of time a right to use the air, the earth or the water in a manner which, without such long use, would be inconsistent with the rights of his neighbors, and subject to immediate correction by process of law. By the kindly aid of a legal fiction a grant will be presumed, after so great a lapse of time,

from all who had any right to challenge his proceedings. But no user for any shorter period will give him more right against a new comer than he had against an old one. The substance of this doctrine was distinctly held in *Howell v. M'Coy* (3 Rawle, 256), where the defendant's lease was six years older than the plaintiff's; in *Bliss v. Hall* (4 Bing. N. C. 183), where defendant, a tallow chandler, pleaded the priority of his business, and where the plea was met by the court's suggestion that "the plaintiff came to the house he occupies with all the rights which the common law affords, and one of them is the right to wholesome air;" in *Elliotson v. Feetham* (2 Bing. N. C. 134), where a noisy nuisance, which was ten years older than the plaintiff's term, was still held to be a nuisance. The same rule has been applied in favor of subsequent purchasers in a number of English cases above cited, and in *Brady v. Weeks* (3 Barb. 157); *Blunt v. Aikin* (15 Wend. 526); *Vedder v. Vedder* (1 Denio, 257); *Campbell v. Seaman* (63 N. Y. 568). In *Smith v. Phillips* (8 Phila. 10), a District Court case, but an extremely well-considered one, and cited by Wood in his work on Nuisances, the plaintiff, a truck gardener, was a tenant from year to year. He had paid the same annual rent for thirty-three years. The defendant erected a chemical works near his premises and the smoke and vapors therefrom injured the plaintiff's crops. In the action brought by the tenant the defendant insisted that there could be no recovery because by renewing the lease after the erection of the nuisance the plaintiff had voluntarily placed himself in a position where he could be injured, and the fact that he paid the same rent with the nuisance that he did before it existed was a virtual admission on his part that no serious injury resulted therefrom. The court rejected the argument and held that no such presumption could be raised from the facts, and that the plaintiff was entitled to recover, the same as though he were an owner in fee or a tenant for a term of years. The learned judge who wrote the opinion in that case summed up the whole law of the matter in the following paragraph: "It would be a mischievous doctrine to hold that a

new purchaser, or a new lessee, is not to be protected against an existing nuisance. Such a doctrine would soon make a person who erects a nuisance the master of all owners or lessees who surround him, for if owners, they could not sell to a purchaser or let to a new tenant without great loss to their property; and if lessees, they could not assign their terms or underlet without suffering a similar loss. They might themselves maintain actions for the nuisance, but a suit at law would be a poor equivalent for the diminished value of their estates. Their children too, upon whom their estates would devolve by descent or will, would be without remedy for their ruined inheritance. The application of such a rule would operate as a kind of preemption law in favor of wrongdoers, and cause a gradual confiscation of adjacent estates for their benefit." In commenting upon this case Wood says: "The doctrine of this case is important, and it certainly is predicated upon sound public policy and good common sense. The idea that a wrongdoer can set up, by way of defense, in an action for damages resulting from his wrongful act, the fact that the plaintiff has not seen fit to be driven away from the premises or to demand a reduction in the rent is, to say the least, somewhat audacious if not preposterous."

It is apparent that the rule in *Kernochan's Case* (*supra*) would be an extremely convenient one in all cases and, probably, a just one in many cases arising out of nuisances; but we think it cannot be adopted as a general rule applicable to the law of nuisances without overturning the fundamental principles upon which that law is based. If an ordinary nuisance is to be hallowed by the presumption of permanence we may well pause to inquire — whither are we drifting? This inquiry is as pertinent in the case at bar, where the nuisance is created in the processes of a work of great public utility, as it would be in a case where the nuisance is not sought to be cloaked beneath the plea of "*pro bono publico*." If there is a nuisance, there is a wrong, which the court will neither shield by presumption nor encourage with its protection. We conclude, therefore, that the doctrine of

Kernochan's case was not intended to be applied to the general law of nuisances but to a condition created by the construction and operation of the elevated railroads which has no exact parallel in any other department of our jurisprudence.

This, of course, leads to the further conclusion that the modification of the judgment herein as to damages, upon the authority of the *Kernochan* case, was erroneous and this would require a reversal of the judgment of the Appellate Division and an affirmance of the judgment entered upon the decree of the trial court, but for an oversight of the latter court as to the period for which the plaintiff was entitled to recover damages. It is familiar law that the damages which may be recovered in actions of this character are limited to the period of six years immediately preceding the commencement of the action. (Code Civ. Pro. sec. 382; *Matter of Neillely*, 95 N. Y. 382; *Roberts v. Ely*, 113 N. Y. 128; *Butler v. Johnson*, 111 N. Y. 204; *Colrick v. Swinburne*, 105 N. Y. 503.) The six years' Statute of Limitations was pleaded by the defendant. The action was commenced on the 3d day of December, 1898. Plaintiff's allegations and proofs as to damages cover the whole period from June, 1886, to the commencement of the action. The judgment contains no limitation as to the period for which damages were awarded. Presumptively they were intended to cover all the loss suffered by the plaintiff. This omission to limit plaintiff's right of recovery to the period of six years immediately preceding the commencement of the action, presents error which requires a new trial, and renders it unnecessary to examine or discuss the other assignments of error relied upon by the defendant to secure a new trial in the event of a reversal of the judgment herein. Nor need the question of damages be discussed at this time, for it must be evident, in spite of what has been said about the relative rights of owner and tenant, that unless the plaintiff can show that she has suffered some loss which is distinctly her own there can be no basis for a recovery by her.

The judgment herein should be reversed and a new trial had, with costs to abide the event.

HAIGHT, J. (dissenting). This action was brought to enjoin the defendant from maintaining a nuisance, and to recover the damages which the plaintiff had suffered by reason thereof.

The case was tried before the court at Special Term and judgment for \$4,000.00 damages with costs, and an extra allowance of 5%, was awarded to the plaintiff with an injunction. The Appellate Division on an appeal by the defendant modified the judgment by reducing the damages to six cents, and by reducing the cost in the amount of the extra allowance, and by vacating the injunction; and then affirmed the judgment as modified, giving to the plaintiff a judgment for six cents damages and \$110.37 costs. The plaintiff then appealed to this court from so much of the judgment as reduced the damages to six cents and the costs to \$110.37, but did not appeal from the order vacating the injunction or the judgment as entered. The defendant acquiesced in such judgment and has not appealed therefrom. The only question raised by this appeal is as to whether the Appellate Division properly reduced the judgment. The extra allowance was a percentage based upon the amount of the recovery; and the amount allowed as damages of necessity controls the amount of the extra allowance. In reviewing this question we must bear in mind that the Appellate Division has the power to review evidence and to modify and reduce judgments, when, in its opinion, the amounts awarded are too high; and that this court is limited in its jurisdiction to the review of questions of law only.

In order to determine the question of law presented by this appeal, it becomes necessary to understand more fully the situation of the parties. In the year 1888 the plaintiff rented the premises known as No. 33 West 26th street, New York city, until the first of May, 1890, and occupied the same as tenant keeping a boarding house. At the expiration of the lease she again leased the premises for a period of three years, and thereafter from year to year until the first of May, 1897, when she again leased the premises for a term of three years. In the fall of 1888 the defendant became possessed of certain

lands upon the same street, one hundred and seventy-five feet distant from those occupied by the plaintiff, and constructed large buildings thereon in which were placed steam boilers, engines, pipes, dynamos, electric machines and other machinery for the purpose of generating electricity to be supplied by it to the general public for lighting and other purposes. The trial court found that smoke and cinders emitted from defendant's premises were cast upon those occupied by the plaintiff, and that the jar and vibration caused by the running of the defendant's machinery interfered with the plaintiff's enjoyment of her premises; that she was prevented from renting rooms in the house; that her furniture was injured, and that she was subjected to extra expense for laundry work. For all of which the court allowed her \$4,000.00 damages. Upon the trial the plaintiff was allowed to show her income derived from the rent of the rooms of her house from 1886 to 1888, prior to the construction of the defendant's plant, and then from 1888 until 1893, and then from 1893 down to the time of the trial of this action; from which it is claimed that there was a depreciation in the rental value of her premises of \$25.00 per week after the construction and operation of defendant's plant down to 1893, and thereafter a depreciation of \$70.00 per week. This evidence was all taken under an objection and an exception interposed by the defendant. It was claimed that this depreciation in the rental value of the premises resulted largely from the jar and vibration of the house, caused by the operation of the defendant's heavy machinery, and it appears to be the chief item of damages awarded by the court. The other items of damages which the court appears to have allowed in making the total award of damages consisted of the damage to the plaintiff's furniture, caused by the smoke and cinders, and to the extra expense to which she was subjected in having her laundry work done at another place. But these items will be considered separately hereafter.

The principal question presented is as to whether a tenant in possession of premises, under a lease made after the con-

N. Y. Rep.]

Dissenting opinion, per HAIGHT, J.

struction and operation of an electric lighting plant containing heavy machinery, can maintain an action to recover the depreciation in the rental value of premises occasioned thereby. This question is far-reaching and is one of considerable importance, and it, therefore, should be carefully considered.

Our largest and most flourishing cities are largely filled with manufacturing plants in which the industries of the country are carried on. In most of these plants there are engines, boilers and machinery from which there proceeds some smoke and noise, which, to some extent, inconveniences those who chance to be living in close proximity. It is not every slight inconvenience thus produced that will justify a court of equity in interfering by awarding damages or an injunction. These industries are beneficial to the public, and it is for the public interests that they should be operated within reasonable bounds. It is only where they so seriously interfere with the occupants of premises in the vicinity as to constitute a nuisance that the court will interpose its restraining power and award damages.

Under the findings in this case it will be assumed that the defendant's plant constituted a private nuisance, so far as the plaintiff was concerned, and that she had the right to maintain this action. The question is, therefore, narrowed to one of damages and is involved in the proposition already suggested. It must be conceded that the judicial expressions found in the opinions of reported cases are not all in accord in different jurisdictions and that some confusion has arisen by reason thereof, but this confusion is largely due to the failure of the writers to keep in mind the distinction between damages resulting to real property and those resulting to personal property which may be owned by different persons.

In this case the defendant's plant consists of permanent buildings filled with heavy machinery, and is operated for the purpose of supplying the public with light and electric power. It is not a temporary concern which may be operated in one place to-day and in another place to-morrow, but it is a per-

manent institution involving a great amount of labor and expense in its construction, and from which radiate all the lines and wires that supply light and power to various sections of the city in which it is used. If this plant becomes a nuisance, its effect is to depreciate the rental and fee value of the real property surrounding it. Who are the persons injured thereby? Manifestly, the tenants who have rented premises before the creation of the nuisance who suffer a depreciation in the rental value of the premises during the existence of their lease and the landowners of the premises not rented. If premises are rented after the creation of the nuisance, the tenants are presumed in law, in the absence of an express agreement to the contrary, to have procured them at their diminished rental value, the landlord remaining the sufferer and entitled to recover the diminished rental as damages. This would seem to be logical and just as between the landlord and tenant, and it would seem to be quite unjust to permit the tenant to obtain the rent of the premises at a diminished rental value, and then to recover the amount of such diminished rental value of the offending party and thus deprive the owner thereof, who would be the real sufferer. I had supposed that this question had been finally settled in this state by the decision rendered in the case of *Kernochan v. N. Y. El. R. R. Co.* (128 N. Y. 559), in which it was held that the construction of an elevated railroad in a street of a city without having acquired the easements therein of an abutting owner, if it diminishes the rental of the property, is an injury to the inheritance; and although the owner after such construction has leased the premises, he may maintain, and has the exclusive right to maintain, an action for the damages sustained for the diminution in the rental value caused by the construction and operation of the railroad during the period in which the premises are in the occupation of the tenant under the lease. It is now said of this case that it is *sui generis* and is governed by principles which are applied to no other class of cases. It is true that the elevated railroad is not an electric lighting plant, but I confess, so far as

the question of law under consideration is concerned, I am unable to see why the rule should apply in one case and not in the other. The elevated railroads are permanent structures. The trains over them are drawn by steam engines which emit smoke, create a noise and jar which causes vibration in abutting buildings and the rattle of windows. The elements of damages thus far are the same. The opinion in the *Kernochan* case was written by Chief Judge ANDREWS, who reached his conclusion after a careful examination of the authorities upon the subject, both English and American, none of which, with a single exception, were elevated railroad cases, and cannot well be said to be *sui generis*.

This case has since been approved in the following cases: *Hins v. N. Y. El. R. R. Co.* (128 N. Y. 571); *Kearney v. Metropolitan El. Ry. Co.* (129 N. Y. 76); *Witmark v. N. Y. El. R. R. Co.* (149 N. Y. 393); *Kernochan v. Manhattan Ry. Co.* (161 N. Y. 339); *Shepard v. Manhattan Ry. Co.* (169 N. Y. 160); *Fries v. N. Y. & Harlem R. R. Co.* (169 N. Y. 270).

Other cases which precede it, and upon which the conclusion was reached, are the following: *Jesser v. Gifford* (4 Burr. 2141); *Leader v. Moxon* (3 Wils. 461); *Bedingfield v. Onslow* (3 Lev. 209); *Clowes v. Staffordshire Potteries W. Co.* (L. R. [8 Ch. App.] 125); *Kidgill v. Moor* (9 C. B. 364); *Bell v. Midland Ry. Co.* (10 C. B. [N. S.] 287); *Mott v. Shoolbred* (L. R. [20 Eq.] 22); Addison on Torts, 139; *Baker v. Sanderson* (3 Pick. 348); *Sumner v. Tileston* (7 Pick. 198); *Pappenheim v. Met. El. Ry. Co.* (128 N. Y. 436).

I shall not attempt a digest of these cases further than to state that they held that an action lies by a reversioner for a wrongful obstruction of light in his house; for a permanent obstruction in an adjacent street; for obstructing a private way appurtenant to his premises; for preventing an access of tenant to a wharf; for fouling a stream passing through his land upon which dye works had been erected; for obstructing his mills, in consequence of which his tenant threatened to

quit; and for raising a dam below plaintiff's mill, causing the water to back up and flood plaintiff's premises, thus diminishing their rental value. Of course all injuries for which the owner can recover, and not the tenant, must be of a permanent character, affecting the rental and fee value of the premises. Mere trespasses occurring during the existence of the lease, resulting in no injury to the reversioner's interest, only affect the tenant, and he may, therefore, recover therefor.

The lessee and reversioner may both be injured by the same wrong, and each may maintain an action therefor. The tenant being entitled to the possession of the premises is alone affected by the temporary trespasses committed thereon; and if the crops which he plants are injured, the damages belong to him and not to the owner. (*Bedingfield v. Onslow, supra*; *Smith v. Phillips*, 8 Phil. 10; *Shelfer v. City of London Electric Lighting Co.*, L. R. [1 Ch. 1895] 287.) In the latter case the action was for an injunction and for damages against an electric light company. Two actions were prosecuted and tried together, one by the tenant and the other by the reversioner. The tenant had a lease for twenty-one years. The interest of the reversioner was, therefore, remote, but the court held that the structure of the electric light plant was permanent in character, and that the reversioner was entitled to recover the damages that resulted to the freehold. LINDLEY, L. J., in delivering his opinion, says with reference thereto: "This is not a case of a temporary nuisance which is likely to cease before the existing tenancy expires. * * * The nuisance is of a totally different character; and for such a permanent nuisance as this, and consequent permanent injury to the reversion, I have no doubt an action by the reversioner for damages would lie. * * * In this case it is idle to suppose that the vibration, which is the real cause of the continuing injury, will cease. It must be borne in mind that the defendants are a corporation created for the express purpose of supplying electricity for a time to which no limit can be assigned, and they have gone to great expense in making foundations and erecting permanent works on a large scale." (See, also, *Park*

N. Y. Rep.]

Dissenting opinion, per HAIGHT, J.

v. *White*, 23 Ont. 611; *Kavanagh v. Barber*, 131 N. Y. 211; *Morton v. Mayor etc. of N. Y.*, 140 N. Y. 207; Wood on Nuisances [3d edition], secs. 826, 827).

The damages in this class of cases are the diminished rental value. (*Francis v. Schoellkopf*, 53 N. Y. 152; *Drucker v. Manhattan Ry. Co.*, 106 N. Y. 157; *Hussner v. Brooklyn City R. R. Co.*, 114 N. Y. 433; *Tallman v. Met. El. R. R. Co.*, 121 N. Y. 119.)

The plaintiff having rented the premises after the construction and operation of the defendant's plant must be assumed to have paid only the rental value of the premises under the existing conditions. As we have seen, she rented from year to year for a number of years, and then, finally, for a period of three years. During all this time the defendant's plant was in operation, and she knew its nature and character and fully understood that the defendant company intended to continue its business. The plaintiff and her landlord must, therefore, be deemed to have agreed upon the amount of rent that should be paid under the surrounding conditions existing at that time. (*Baker v. Sanderson*, *supra*, and *Sumner v. Tileston*, *supra*.) It is said, however, that the plaintiff paid the same rent during the last years of her occupancy of the premises that she paid during the first years of her tenancy. This may be, but still that fact does not remove the presumption that parties contracted anew, at the time of the executing of each new lease, with reference to the surrounding conditions then existing. The territory in that vicinity may in the meantime have largely increased in its fee and rental value. Were it not for the existence of defendant's plant the rental value of these premises may have commanded a much larger sum than was paid by the plaintiff. The plaintiff claims that the rental value of her rooms had depreciated \$70.00 per week. This far exceeds the rent paid by her for the premises, and, therefore, indicates that had it not been for the defendant's plant the rental value of these premises would have been much larger than that which she paid.

I think the diminished rental value of the premises belonged

to the landlord and not to the plaintiff, and that, therefore, the evidence to which attention has been called of the diminished rental value of the rooms in the house, which was taken under objection, was improperly received.

As to the damages to the furniture resulting to the plaintiff from smoke and cinders, and as to the extra expense by reason of her having her laundry work done outside of the house, the plaintiff clearly had the right to maintain her action and to recover the damages that she had suffered. These items are independent of that resulting from the depreciation in the rental value of the premises. For these damages the Appellate Division has awarded her six cents. The record does not disclose the amount that the trial court allowed her therefor. There was evidence tending to show that the cost of cleaning the furniture was \$150.00 per year, but whether this cost was over and above that required for ordinary cleaning does not clearly appear. There was evidence also tending to show that the cost of the washing outside was \$2.00 per week, but it does not appear clearly what the cost of the laundry would have been had it been done in the plaintiff's own house. Under this condition of the evidence the Appellate Division has held that substantial damages could not be awarded, and consequently has allowed only nominal damages. It is quite possible that a more equitable result might have been obtained by a new trial, but under the evidence in this case I do not see how we can properly interfere with this judgment. I, therefore, favor an affirmance.

BARTLETT, MARTIN, VANN and CULLEN, JJ., concur with WERNER, J.; PARKER, Ch. J., concurs with HAIGHT, J.

Judgment reversed, etc.

In the Matter of the Accounting of JOSEPH GORDEN et al.,
 as Executors of and Trustees under the Will of WILLIAM
 GORDEN, Deceased.

172	25
e172	384
172	25
s172	384

JOSEPH GORDEN et al., as Executors, etc., et al., Appellants;
 SUSAN GORDEN, Respondent.

WILL — WHEN CLAIM OF DOWER IS INCOMPATIBLE WITH TESTAMENTARY PROVISIONS FOR THE WIDOW. Under a will devising all of testator's real property, constituting the bulk of his estate, to trustees until his youngest child, about one year old, shall become of age and directing that one-third of the net income, after paying expenses including insurance and repairs, shall be paid to the widow and the other two-thirds expended for the support and education of his children, and upon the expiration of the trust one-third to be conveyed to the widow during her life or widowhood and the other two-thirds to his children, and authorizing the trustees to sell all the real estate of which the testator died "seized and possessed" and to reinvest the proceeds "in such other real estate or profitable securities as to them shall seem proper for the preservation of the said estate and the carrying into effect of the trusts herein created," there is a manifest incompatibility between the provision of the will and a claim of dower by the widow, and she is not entitled thereto in addition to the provisions made for her benefit by the will.

Matter of Gordon, 68 App. Div. 388, modified.

(Argued June 9, 1902; decided October 7, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered January 30, 1902, which affirmed a decree of the Kings County Surrogate's Court settling the accounts of Joseph Gordon, Susan Gordon, Burt D. Harrington and Stephen M. Hoyer, as executors of and trustees under the will of William Gordon, deceased.

William Gordon, a resident of the borough of Brooklyn, died in January, 1899, leaving him surviving a widow, twelve children and several grandchildren, the issue of a deceased daughter. Seven of his children were infants and one was of unsound mind. He left real estate, unincumbered, worth about \$240,000, and personal property, which, aside from that

specifically bequeathed, was worth about \$10,000. By his will, dated December 30th, 1898, after some bequests of minor importance, he gave to his wife the household furniture in his homestead, the implements, tools and chattels upon his farm, and all his domestic animals, wagons and vehicles. All the rest of his estate, both real and personal, of which he should die "seized and possessed," he gave to his executors in trust to collect the rents and profits, pay the expenses and keep the buildings insured and in repair, until his youngest child, an infant of tender years, should attain his majority. He directed his trustees to pay one-third of the net income to his widow and to pay and apply in their discretion the remaining two-thirds to the support, maintenance and education of his children, with a limitation in the case of his incompetent daughter to an annual expenditure of not exceeding \$500. Upon the termination of the trust he required his trustees to retain one-third of the *corpus* of the estate for the use of his widow during her life, or so long as she should remain unmarried, and upon her decease or marriage said third was to be distributed as hereinafter mentioned. He directed that the remaining two-thirds should be conveyed to his children, except that his trustee were required to set aside an amount large enough to secure an income sufficient to pay an annuity of not more than \$500, to be expended for the support of his incompetent child, and upon her decease, if it should not occur until after the main distribution had been made, the principal and accumulated income were to revert back to and be distributed among his other children. The children of any deceased child were to take the parent's share. He gave his trustees full power to sell, mortgage and convey all or any part of his estate, real or personal, and directed them to reinvest the proceeds of any sale in such other real property or profitable securities as they should deem proper for the preservation of the estate and the carrying into effect of the trust created. He appointed four trustees, including his wife and one of his sons.

On the 30th of March, 1900, the widow began an action in

N. Y. Rep.]

Points of counsel.

the Supreme Court for the admeasurement of her dower in the real estate, and the action was still pending when the decree appealed from was made. Upon the accounting of the trustees before the surrogate, he decreed that they should retain in their possession one-third of the rents and profits of the real estate to await the final determination of said action, and adjudged that the widow was entitled to dower in addition to the provisions made for her benefit by the will. Two of the trustees and several of the children appealed to the Appellate Division of the Supreme Court, where the decree of the surrogate was unanimously affirmed. The appellants below now appeal to this court.

William P. Pickett for Joseph Gorden, as executor and trustee, appellant. The intention of the testator was in case the widow should elect to claim dower, to exclude her from the other provisions of the will. (*Asche v. Asche*, 113 N. Y. 234; *Konvalinka v. Schlegel*, 104 N. Y. 125; *Adsit v. Adsit*, 2 Johns. Ch. 448; *Savage v. Burnham*, 17 N. Y. 561; *Tobias v. Ketchum*, 32 N. Y. 319; *Vernon v. Vernon*, 53 N. Y. 351; *Matter of Zahrt*, 94 N. Y. 605; *Lewis v. Smith*, 9 N. Y. 502; *Kimbel v. Kimbel*, 14 App. Div. 570; *Closs v. Eldert*, 30 App. Div. 338.) The full and explicit power of sale contained in the 12th paragraph of the will indicates an intention on the part of the testator to give to the trustees complete power to sell or mortgage any part of the property free from the claim of dower. (*Asche v. Asche*, 113 N. Y. 235.)

Edward L. Somerville for Stephen M. Hoyer, as executor and trustee, appellant. The testamentary provision for the widow was intended by the testator to be in lieu of her dower in his estate. (*Closs v. Eldert*, 30 App. Div. 338; *Konvalinka v. Schlegel*, 104 N. Y. 135; *Lewis v. Smith*, 9 N. Y. 502; *Matter of Zahrt*, 94 N. Y. 610; *Le Fevre v. Toole*, 84 N. Y. 95; *Tobias v. Ketchum*, 32 N. Y. 319; *Savage v. Burnham*, 17 N. Y. 561.)

George W. McKenzie and *George P. Beebe* for respondent. The provisions of the will are to be construed as additional provisions during the time the widow remains unmarried. (*Harrison v. Harrison*, 1 Keen, 765; *Church v. Bull*, 2 Den. 430; *Wood v. Wood*, 5 Paige, 596; *Lasher v. Lasher*, 13 Barb. 106; *Sanford v. Jackson*, 10 Paige, 266; *Mills v. Mills*, 28 Barb. 455; *Dawson v. Bell*, 1 Keen, 761; *Matter of Smith*, 1 Misc. Rep. 276; Scribner on Dower [2d ed.], 456; 2 Jarm. on Wills, 24.) The scheme of the will can be substantially carried out if the widow should receive dower in addition to the provisions of the will. (*Kimbel v. Kimbel*, 14 App. Div. 570; *Closs v. Eldert*, 30 App. Div. 338; *Gibson v. Gibson*, 1 Drew. 52; *Matter of Frazer*, 92 N. Y. 250; *Konvalinka v. Schlegel*, 104 N. Y. 125.) The testator intended that the widow should receive the provisions of the will in addition to dower. (*Kimbel v. Kimbel*, 14 App. Div. 570; *Konvalinka v. Schlegel*, 104 N. Y. 125; *Gibson v. Gibson*, 1 Drew. 52; *Havens v. Havens*, 15 N. Y. 372; *Bending v. Bending*, 26 L. J. Ch. 469; *Ellis v. Ellis*, 3 Hare, 310.) The widow is entitled to the specific and absolute bequests contained in the 7th and 9th clauses of the will, even though she would be required to elect between the provisions of the 10th clause of the will and dower. (*Yates v. Fuller*, 8 Paige, 331.)

VANN, J. The only question argued before us is whether the widow of the testator is entitled to the provision made for her by her husband in his will in addition to dower in his real estate. If she was put to her election, she made it by commencing an action for the admeasurement of her dower. (L. 1896, ch. 546, § 180; 2 Scribner on Dower [2nd ed.], 511.)

While dower is favored by the law, the right to both dower and the benefit of a testamentary provision must yield to the intention of the testator when expressly stated or clearly implied. If there is reasonable doubt the widow takes both, but when the intent to limit is clear she is put to her election. This intent must appear from the will itself, read in the light

N. Y. Rep.]

Opinion of the Court, per VANN, J.

of existing facts. "The claim of dower," said Chancellor KENT, "must be inconsistent with the will and repugnant to its dispositions, or some of them." (*Adsit v. Adsit*, 2 Johns. Ch. 448, 451.)

The language of learned judges in laying down the rule upon the subject varies somewhat in form, and for convenience in making comparison, we repeat it, as stated in the leading cases in this court. It was laid down in an early case as follows: "Where there is no direct expression of intention that the provision shall be in lieu of dower, the question always is whether the will contains any provision inconsistent with the assertion of a right to demand a third of the lands, to be set out by metes and bounds." (*Lewis v. Smith*, 9 N. Y. 502, 511.)

The next time the subject was before the court it was held that the wife is not put to her election "unless it clearly appears from the will that the provision made for her was intended as a substitute for that to which she is entitled by law. The intention need not be declared in express words. It may be implied, if the claim of dower would be plainly inconsistent with the will." (*Savage v. Burnham*, 17 N. Y. 561, 577.)

In *Tobias v. Ketchum* (32 N. Y. 319, 324) the test given is that the devise of the will "be so repugnant to the claim of dower that they cannot stand together."

In *Vernon v. Vernon* (53 N. Y. 357, 361) it was declared that dower is not barred "unless the claim of dower is inconsistent with some other disposition of or arrangement made by the testator in respect to his property, thereby showing an intention to substitute the testamentary gift for the provision which the law makes for her." The court then repeated with apparent approval the following declaration of Lord REDFORD, in *Birmingham v. Kirwan* (2 Sch. & Lef. 452): "The result of all the cases of implied intention seems to be that the instrument must contain some provision inconsistent with the assertion of a right to demand a third of the lands to be set out by metes and bounds."

In *Matter of Zahrt* (94 N. Y. 605, 609) the court adopted the rule as laid down by Lord REDESDALE, *ipsissimis verbis*.

In *Konvalinka v. Schlegel* (104 N. Y. 125, 129) language was used which seems to have produced confusion in the minds of the learned judges below. We then said that in the absence of express words "there must be upon the face of the will a demonstration of the intention of the testator that the widow shall not take both dower and the provision. The will furnishes this demonstration only when it clearly appears without ambiguity or doubt that to permit the widow to claim both dower and the provision would interfere with the other dispositions and disturb the scheme of the testator, as manifested by his will. * * * We repeat, the only sufficient and adequate demonstration which, in the absence of express words, will put the widow to her election, is a clear incompatibility, arising on the face of the will, between a claim of dower and a claim to the benefit given by the will." This is simply a restatement of the old rule in somewhat different language, as appears in *Asche v. Asche* (113 N. Y. 232, 235) where it was declared that dower is excluded when "there is a manifest incompatibility between such provision and dower," and the *Konvalinka* case is cited among others to support the principle. This is the latest utterance by the court upon the subject to which our attention has been called.

We do not think that the rule has been extended or essentially varied during the past fifty years, for a manifest incompatibility must exist whenever the will contains provisions so inconsistent with the right of dower that if the widow had the benefit of both, it would defeat the intention of the testator. The question now before us, therefore, is whether there is a manifest incompatibility between the provisions of Mr. Gordon's will and the claim of dower by his widow. Where a valid trust is created covering all the real estate of the testator we have always held it to be inconsistent with the right of the widow to manage or control any part of the realty. Thus in *Savage v. Burnham* it was said: "In this case the testator devised and bequeathed all his estate, real and personal, to

trustees, the real estate upon trust to sell after the death of his wife. During her life she was to have one-third of the clear rents and profits, and the other two-thirds were to go into the general trust fund for distribution. The entire estate, with all its income, except the one-third of the rents and profits of the land, is given, in the clearest possible terms, to the testator's children and the children of his daughters. It is, therefore, impossible for her to receive any part of it, except what is there expressly given to her, without subverting the will to that extent. If no provision had been made for her, she would have been entitled to have one-third of the real estate set off to her during life, and in this she would have held the legal estate. Inconsistently with this, the will gives the legal estate in all the lands to trustees, and directs that she shall have one-third of the rents; the other two-thirds to go into a personal fund for distribution. A claim of dower in the same lands cannot stand with these provisions, and we must, therefore, hold that the widow was bound to elect whether she would take her dower or the provision in her favor made by the will." (p. 577.)

In *Tobias v. Ketchum* the testator empowered his executors to rent, lease, repair and insure his real estate, until sold or divided, and out of the rents and profits to pay the provision made for the widow, and it was held a devise to them of the legal estate in trust and inconsistent with the claim of dower therein. The widow was accordingly put to her election.

In *Vernon v. Vernon* the same learned judge who wrote the opinion in the *Konvalinka* case said: "The testator devised to his wife in fee a portion of the lands of which she was dowable. He devised all his remaining lands (except his reversionary interest in Scotland House) to trustees charged with the payment to her of an annuity for life out of the rents and profits, to pay which requires more than the income from the property; and he declares that the annuity is given to her for her maintenance and the education and maintenance of her children. It is not necessary in this case to decide

whether these circumstances conjoined show the 'manifest intent' requisite to bar the widow of her dower. * * * The provision that the executors may sell the stores at a price fixed by him in the will, or take a conveyance from his brother Thomas, of the moiety owned by him, at the same price in the adjustment of the testator's interest in the firm of Vernon Brothers & Co., clearly indicates that the power intended to be given by the testator to his executors was a power to transfer, in case of sale, the whole title free from any claim of dower. This provision is inconsistent with the widow's claim of dower, and she was put to her election." (p. 362.)

In the *Zahrt* case the obligation to keep the buildings and personal property insured and pay all taxes and keep the estate in good repair was held inconsistent with the assertion of a dower right.

In the *Konvalinka* case the widow was not put to her election because the devise to the executors was void as a trust, although valid as a power in trust, and the lands vested in the heirs subject to the execution of the power. The trustees had neither title nor control. It was declared that the execution of the power was not inconsistent with the dower interest as a sale could be made subject thereto. There was no disposition of the income and this feature was relied upon to distinguish the case from *Savage v. Burnham* and *Tobias v. Ketchum*.

While a mere power of sale, to be promptly exercised for the purpose of distribution, does not put the widow to her election, the vesting of title in trustees not only with power to sell and reinvest, but with special directions as to control and management and the payment over of the annual income to the widow and children, during the term of the trust, we regard as sufficient. Thus, in the latest case decided by us, we held that the creation of a trust and the vesting of title to the realty in trustees was inconsistent with an implied right upon the part of the widow to manage and control any part of the estate. (*Asche v. Asche, supra*.) When a testator

devises all his real property, constituting the bulk of his estate, to trustees until his youngest child, about one year old, shall become of age and directs that one-third of the net income, after paying expenses, including insurance and repairs, be paid to the widow and the other two-thirds expended for the support and education of his children, and, upon the expiration of the trust, one-third to be conveyed to the widow during her life or widowhood, and the other two-thirds to his children, there is a manifest incompatibility between the provisions of the will and a claim of dower. By allowing the latter the scheme of the will would be defeated, for that intrusts the control and management of the entire estate to trustees, while the right to dower carries with it the control and management of one-third of the realty during the life of the dowager.

The right to mortgage and to sell and reinvest, as given by the will before us, is inconsistent with the claim of dower. The trustees were authorized to sell all the real estate of which the testator died "seized and possessed," and to reinvest the proceeds "in such other real estate or profitable securities as to them shall seem proper for the preservation of said estate and the carrying into effect of the trusts herein created." He thus necessarily contemplated the conveyance of the entire title and the keeping together of the whole estate for the benefit of the trust. As was said in the *Asche* case: "The absolute power of sale conferred upon the executors was evidently not intended to be limited or impaired by an inability on their part to convey a good title to the whole of such real estate, and the purposes of the will required such sale to be made unhampered by obstructions which might be interposed by conflicting interests in the property." (p. 235.) (See, also, *Le Fevre v. Toole*, 84 N. Y. 95.)

Furthermore the direction "to keep the real estate in repair and to insure against loss by fire," manifestly meant the entire estate, not two-thirds thereof, for no division in the management, possession or control was in contemplation. As we said in

Tobias v. Ketchum (*supra*) of the widow there, so we may say of the widow here, that "her claim of dower, if allowed, would inevitably defeat the scheme of the will, for it would prevent the trustees from holding the legal title of the whole estate and receiving the entire rents and profits for the purpose of paying assessments, interest, repairs and insurance and ascertaining the net income, of which one-third is to be paid to the widow and the residue ultimately to the other beneficiaries." (p. 327.) Then again the limitation by the testator of the expenditure for the benefit of his unfortunate child to a sum not exceeding \$500, indicates that he expected and intended that her proportion of the income should be at least that sum, which could hardly be the case if the claim of dower is sustained.

In our opinion it is manifest from the carefully devised plan to invest the trustees with the continuous management of all the real estate for a long term of years, that the testator did not intend that one-third of his estate should be placed in the possession and under the control of the widow, and at the same time that she should receive one-third of the income derived from the two-thirds then remaining. He did not intend that five-ninths of the income should go to her, while only one-twenty-seventh went to each of his twelve children. Such a construction would be in contradiction of the will and would disappoint the intention of the testator. We think that the dispositions of the will cannot "be fulfilled consistently with the operation of the claim of dower," and, therefore, so much of the order of the Appellate Division and the decree of the surrogate as in effect allowed the widow one-third of the rents and profits of the estate should be reversed and the proceedings remitted to the surrogate with instructions to modify and readjust his decree accordingly, with one bill of costs to the appellants against the respondent in all courts.

PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, CULLEN and WERNER, JJ., concur.

Ordered accordingly.

THE MERCANTILE NATIONAL BANK OF THE CITY OF NEW YORK, Appellant, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK et al., Respondents.

1. TAX—NEW YORK CITY—POWER OF EQUITY TO RESTRAIN COLLECTION OF TAX WHEN NO REMEDY EXISTS AT LAW. While the provisions of the Consolidation Act (L. 1882, ch. 410, §§ 819–821, as amd. by L. 1885, ch. 311) for the review by certiorari of assessments made in the city of New York are exclusive, the common-law writ of certiorari for that purpose having been superseded thereby, and the statute affording relief only where an assessment is illegal or erroneous by reason of overvaluation, a court of equity has inherent power in a proper case to restrain the collection of the tax imposed upon grounds not provided for by the statute, and for which no relief can be had by certiorari; it is not its province, however, to interfere in a case where the grievance assigned does not relate to some question of fraud or of illegal discrimination or classification.

2. ASSESSMENT OF NATIONAL BANK STOCK AT HIGHER RATIO OF VALUE THAN REAL ESTATE—WHEN EQUITY WILL NOT RESTRAIN COLLECTION OF TAX. An action will not lie in equity to restrain the collection of a tax imposed upon the stock of a national banking association by the commissioners of taxes and assessments of the city of New York upon the sole ground that the stock was assessed at its actual value while the real estate of the city was assessed at not more than sixty per cent, thus creating an inequality of assessment, whereby the owners of such stock are required to pay an undue proportion of the taxes assessed for city, county and state purposes, although the grievance assigned is not one which, under the statute, can be reached by the writ of certiorari or for which there exists any remedy at law, where, in the absence of evidence to the contrary, it must be presumed that the taxing officers acted honestly and impartially in making the assessment, with no intention to discriminate to the injury of a class of persons or of a species of property, and the valuation as fixed by them was uniform with respect to each class of property.

Mercantile Nat. Bank v. Mayor, etc., of New York, 50 App. Div. 628, affirmed.

(Argued March 31, 1902; decided October 7, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 24, 1900, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Special Term.

This action, on the equity side of the court, is brought by the plaintiff, a banking institution organized under the National Banking Law, to restrain the municipality of the city of New York and its receiver of taxes from collecting a portion of the taxes imposed for the year 1896 upon the plaintiff's stockholders. The following facts are alleged in the complaint: The shares of the plaintiff's capital stock, being 10,000 in number, of the par value, each, of \$100, are held by a large number of persons and corporations, resident in New York city and elsewhere, and the commissioners of taxes and assessments of that city had assessed the shareholders at the rate, or valuation, of \$143 per share. Between the second Monday of January and the first day of May, 1896, when, pursuant to the statute, the books of annual record prepared by the assessing officers were open for inspection and correction, the plaintiff, in behalf of its shareholders, applied for a reduction of the assessed valuations of the shares to sixty-six and two-thirds per cent of the assessed value thereof, "in order to equalize the taxes of its stockholders with the taxes of other property on the same rolls." The plaintiff's application was denied; the assessed valuations were duly confirmed by the commissioners, "except in those instances where the valuation was reduced by the allowance and deduction of the indebtedness of said stockholders;" the board of aldermen duly fixed the rate of taxation for the year at \$2.14 for each \$100 of assessed valuation; the assessment rolls were delivered to the receiver of taxes of the city, with the warrant for the collection thereof, and, subsequently, the plaintiff's stockholders were duly notified to make payments of the sums due from them accordingly. The total assessed valuation of real and personal estate in the city for municipal and state purposes, for the year 1896, was the sum of \$2,106,484,905; of which \$1,731,509,143 represented the assessed value of the real estate and \$292,351,569, represented that of the personal estate, other than bank shares; the assessed value of which latter property amounted to \$82,624,193. It is alleged that the laws of the state require all property, real

and personal, liable to taxation, to be assessed at its actual value; that "the real estate of said city, liable to taxation, was deliberately and intentionally assessed and taxed at not more than sixty per cent of the actual value thereof, * * * and the shares of stock of the plaintiff were deliberately and intentionally assessed for taxation and taxed at their full or actual value, after making the proper allowance for the real estate of the plaintiff;" that, if the real estate had been assessed at its actual value, "the amount of taxes which the stockholders of the plaintiff would have been required to pay would not have exceeded sixty-five per cent of the amount of such taxes as actually levied and demanded as aforesaid." It is shown that the statute requires every bank, "to retain any dividend until the delivery to the collector of the tax roll and warrant of the current year and, within ten days after such delivery, to pay to such collector so much of such dividend as may be necessary to pay any unpaid taxes assessed on the stock upon which such dividend is declared," and that a lien is created upon the shares of stock until the payment of the tax. It is alleged that, upon the plaintiff's receipt of the bill for the taxes levied against its stockholders, it duly tendered to the receiver of taxes, on behalf of all of its stockholders, sixty-five per centum of the amount thereof and requested him to apply the same to the payment, pro rata, of the tax imposed; that he refused to accept any sum less than the full amount of the bill; that no portion of this tax upon the shares has been paid and that, unless they are restrained, the defendants will proceed to enforce the collection of the full amount of the taxes levied against the stockholders in the modes allowed by law, to the irreparable injury, not only of the said stockholders, but, also, of the plaintiff; whose standing, credit and franchises will be affected. It is alleged that, if it "should pay the taxes so levied upon said unequal assessments out of moneys of its stockholders in its hands * * * the plaintiff would be subjected to a great multiplicity of suits, brought by its separate stockholders for so doing and, in any event, a great number of suits might be rendered necessary to adjust the rights

of all parties;" that under the provisions of the New York City Consolidation Act, in force in 1896, the grounds of review of an assessment for taxation were "limited to the questions of illegality and overvaluation and no review could be had in the courts of the question of inequality of assessment;" that the usual proceedings by certiorari are not available to the plaintiff, as "the sole grievance consists in the gross inequality of said assessments, whereby the stockholders of the plaintiff are called upon to pay an undue portion of the annual taxes for city, county and state purposes."

The defendants have demurred to this complaint, for insufficiency of facts to constitute a cause of action; the demurrer has been sustained below by the Special Term and by the Appellate Division and leave was granted to the plaintiff by the latter court to appeal to this court.

David Willcox, Silas B. Brownell, Willard Brown, Charles W. Wells and James W. M. Newlin for appellant. Upon tendering the amount of taxes justly due, plaintiff was in position to sue in behalf of its stockholders to enjoin collection of the excess. (*Cummings v. Nat. Bank*, 101 U. S. 153; *Stanley v. Supervisors*, 121 U. S. 535; *N. P. Co. v. Clark*, 153 U. S. 252; *Taylor v. Louisville Co.*, 88 Fed. Rep. 350; 60 U. S. App. 166; *M. Bank v. Whitehead*, 105 Fed. Rep. 809.) The case is a proper one for equitable relief by injunction. (*Heywood v. Buffalo*, 14 N. Y. 534; *Hassan v. City of Rochester*, 67 N. Y. 528; *Dows v. City of Chicago*, 11 Wall. 108; *U. P. Co. v. Cheyenne*, 113 U. S. 516, 525, 526; *Ogden City v. Armstrong*, 168 U. S. 224; *Bank v. Stone*, 88 Fed. Rep. 383; 174 U. S. 799; *L. T. Co. v. Stone*, 107 Fed. Rep. 305; *U. & P. Bank v. Memphis*, 111 Fed. Rep. 561.) The action of the assessing officers is unauthorized by the act of Congress in the premises and violates the constitutional guaranties of the rights of property. (*O. Nat. Bank v. Owensboro*, 173 U. S. 664; *Taylor v. L. Co.*, 88 Fed. Rep. 350; *Virginia v. Rives*, 100 U. S. 313; *Chicago Co. v. Chicago*, 166 U. S. 226; *Abbott v. Tacoma*, 175 U. S. 413;

C. Ry. Co. v. Guenther, 19 Fed. Rep. 395; *D. M. Co. v. Parrish*, 24 Fed. Rep. 197; *Railroad Co. v. Board*, 85 Fed. Rep. 302; *Nashville Co. v. Taylor*, 86 Fed. Rep. 168; *M. T. Co. v. Collins Co.*, 99 Fed. Rep. 812; *Holden v. Hardy*, 169 U. S. 366.)

George L. Rives, Corporation Counsel (*Theodore Connolly, James M. Ward and David Rumsey of counsel*), for respondents. Neither the relator nor the stockholders have been injured by the action of the assessors in assessing personal property at its full value and real property at sixty per cent of its value. (*State R. R. Taxes*, 92 U. S. 575; *People ex rel. v. Barker*, 158 N. Y. 709; 31 App. Div. 315; 179 U. S. 279; *Nat. Bank v. Kimball*, 103 U. S. 732; *French v. B. A. P. Co.*, 181 U. S. 324; *Kelly v. Pittsburg*, 104 U. S. 78; *Stanley v. Bd. Suprs.*, 121 N. Y. 542; *M. Bank v. New York*, 121 U. S. 138; *People ex rel. v. Barker*, 155 N. Y. 330; *People ex rel. v. Dederick*, 161 N. Y. 195.) There was an adequate remedy at law—in that the assessment might have been reviewed by certiorari. (Code Civ. Pro. § 2120; *People ex rel. v. Feitner*, 41 App. Div. 544.) There was an adequate remedy at law—in that the board of taxes and assessments was a judicial body with authority to consider and remedy, upon the plaintiff's application, any inequality of assessment. (*People ex rel. v. Feitner*, 168 N. Y. 441; *Cummings v. Nat. Bank*, 101 U. S. 153; *Hayes v. Missouri*, 120 U. S. 68; *Barbier v. Connolly*, 113 U. S. 27; *Bowman v. St. Lewis*, 11 Otto, 22; *Walker v. Sauvinet*, 92 U. S. 93; *Albuquerque Bank v. Perea*, 147 U. S. 87; *People ex rel. v. Coleman*, 21 N. Y. S. R. 178; *Swift v. City of Poughkeepsie*, 67 N. Y. 511; *Bank of Comm. v. Mayor, etc.*, 43 N. Y. 148.)

GRAY, J. The material facts alleged in the complaint must be regarded as admitted, under the defendants' demurrer, and, the legal question, which, therefore, arises is whether the plaintiff is without remedy at law, and, if that be so, whether it has made out a case for equitable intervention by way of an

injunction restraining the defendants from collecting a portion of the tax levied against its stockholders. The Special Term decided the case upon the theory that the plaintiff had an adequate remedy at law, in a resort to the common-law writ of certiorari to review the action of the tax commissioners and "to have the valuation determined according to the rule and principle prescribed by the statute, or, if that should be impracticable, then according to some uniform rule or principle, which will result in substantial equality of the burden of taxation." The Appellate Division assigned no reasons in affirming the order of the Special Term.

I have grave doubt whether the common-law writ of certiorari would afford to the plaintiff an adequate remedy for the particular grievance assigned in its complaint, if the right to resort to it existed. The issuance of the writ was largely discretionary and its function was to bring up for review the record of the proceedings of tribunals, or boards, possessing a special, or limited, jurisdiction, for inquiry by the court into the questions whether the proceedings were with jurisdiction of the subject-matter and with regularity; that is to say, with due regard to individual rights in matters affecting their persons, or property. Did they keep within the boundaries prescribed by the statute law, or by well-settled principles of the common law, would be the question presented. It was not until the passage of the general act of 1880, (Chap. 269, Laws of 1880), that taxpayers were afforded an effective remedy against illegal, or erroneous, assessments by the writ of certiorari. Prior thereto, as the assessors were deemed to act judicially, the review of the courts was confined to questions of jurisdiction. (*People ex rel. Citizens' G. L. Co. v. Board of Assessors*, 39 N. Y. 81, 88; *People ex rel. Cook v. Board of Police*, *Ib.* 506; *People ex rel. Buffalo & S. L. R. R. Co. v. Fredericks*, 48 Barb. 173; *affd.*, 48 N. Y. 70; *People ex rel. Manh. Ry. Co. v. Barker*, 152 *ib.* 417, 430.) In *People ex rel. Cook v. Board of Police*, (*supra*), Judge WOODRUFF, in his opinion, elaborately reviews the authorities and concludes that there were these

three classes, into which certiorari proceedings divided themselves: *First*, that of the common-law writ, brought to review the summary conviction of a person charged with crime, or offense in law; *second*, that of the common-law writ, brought to review other proceedings of inferior tribunals, magistrates, or bodies of officers, under a special, or limited, jurisdiction, and, *third*, the statutory certiorari. Speaking of the second class, he observed: "The decisions of this state seem to hold with much uniformity that none but jurisdictional questions can be considered." In that case, as in the later case of *People ex rel. Clapp v. Board of Police*, (72 N. Y. 415), where Judge ANDREWS wrote, the question related to the punishment of the relator by the board of police for an offense and it was held that, in such cases, the power to review extended to the consideration of the question whether there was any proof supporting the conviction. In *People ex rel. Manh. Ry. Co. v. Barker*, (*supra*), Judge VANN, having under consideration the act of 1880, and contrasting its provisions with those of the common-law writ, observes of the latter, that it "brings up the record for inquiry into jurisdiction and regularity and in criminal, or quasi criminal, cases, the evidence, also, to see whether, as matter of law, there was any proof which could warrant a conviction of the relator. (Citing cases.) The general statutory writ brings up both record and proceedings for examination, not only as to jurisdiction and method of procedure, but, also, to see whether there was a violation of any rule of law, or any competent proof of all the essential facts, or a preponderance of proof against the existence of any of those facts." Thus, the common-law writ of certiorari, in bringing up for review the proceedings of the commissioners of taxes and assessments, which are, unquestionably, judicial in their nature, (*Barhyte v. Shepherd*, 35 N. Y. 238; *Buffalo & S. L. R. R. Co. v. Supervisors*, 48 ib. 93; *Stanley v. Supervisors*, 121 U. S. 535), would present questions relating to jurisdiction and to regularity and not to the merits of this controversy. But, in my opinion, the common-law writ would be no longer available in

such cases. With the enactment of chapter 269, of the Laws of 1880, there was created a new and complete system for reviewing upon certiorari, and for thereby correcting, the errors of assessing officers. (*People ex rel. Wallkill Valley R. R. Co. v. Keator*, 101 N. Y. 610.) It rendered inapplicable the provisions of the Code of Civil Procedure, relating to the writ of certiorari (*People ex rel. Church of the Holy Communion v. Assessors*, 106 N. Y. 671; *Matter of Corwin*, 135 ib. 245), and resumed within itself the remedies available to a taxpayer aggrieved by the action of the assessing officers. What was discretionary at common law, now became a right. I think that that act became the only authority for the review of errors in assessments for purposes of taxation. It was entitled "An act to provide for the review and correction of illegal, erroneous, or unjust assessments." It authorized the issuance of a writ to review assessments for illegalities, the grounds of which are specified in the petition; or which are alleged to be erroneous by reason of overvaluation, or to be unequal, "in that the assessment has been made at a higher proportionate valuation than other real or personal property on the same roll by the same officers." It appears to be conceded that this general statute would furnish but an inadequate remedy for the plaintiff's grievance. It is not claimed that the assessment of the plaintiff's stockholders was *illegal* in the technical, or statutory, sense; inasmuch as the taxing officers had authority to proceed, and did proceed with regularity, and with all the forms prescribed by law, to their final determination. There was no invasion of the legal rights of the plaintiff, or of those of its stockholders, in the method of procedure for the imposition of the tax upon the shares of stock. A review upon the statutory ground of inequality would not reach the grievance asserted by the plaintiff; because that grievance does not relate to any question of fact, but to the principle, or rule, which had been adopted in the adjustment of municipal taxation for 1896, and which is claimed to have been in violation of the rule prescribed in the Revised Statutes. The inequality

which, under the general act of 1880, is the subject of review, has reference to a case where the assessors have departed from the general rule, or ratio, of assessment in a particular case, to the taxpayer's injury, and where there have resulted unequal valuations of the same class of property, so that the complainant's property has been valued higher in proportion than other similar property on the same assessment roll. (*People ex rel. Warren v. Carter*, 109 N. Y. 576 ; *People ex rel. P. Mfg. Co. v. Moore*, 11 N. Y. State Reporter, 859.) But, after the enactment of the general statute of 1880, in the system of taxation provided by the legislature for the city of New York, and which was embodied in the provisions of the New York City Consolidation Act, passed in 1882, the grounds of review by certiorari were still more locally restricted and, in my opinion, the right of the taxpayer to sue out the writ was limited to what the provisions of the Consolidation Act permitted. Section 819 of the Consolidation Act authorized the commissioners of taxes and assessments, within periods of time mentioned, to increase, or to diminish, "the assessed valuation of any real or personal estate in said city, as in their judgment may be necessary for the equalization of taxation," etc. Section 820 provided that "any person considering himself aggrieved by the assessed valuation of his real or personal estate may apply to the commissioners of taxes and assessments to have the same corrected." Section 821 of the Consolidation Act, as originally enacted, read that "a certiorari to review or correct on the merits any decision or action of the commissioners under either of the two preceding sections shall be allowed by the Supreme Court or any judge thereof directed to the said commissioners on the petition of the party aggrieved." It was amended in 1885, so as to read: "A certiorari to review or correct on the merits any decision or action of the commissioners, under either of the preceding sections, shall be allowed by the Supreme Court or any judge thereof, directed to the said commissioners on the petition of the party aggrieved, but only on the grounds, which must be specified in such petition, that the assessment is illegal, and

giving the particulars of the alleged illegality; or is erroneous by reason of overvaluation." These provisions were comprehensive of the subject-matter of the right to review by certiorari an assessment made by the commissioners of taxes and assessments of New York city. The legislative intention is manifest, in the amendment of section 821, that the grounds specified for the issuance of the writ should be exclusive of all other grounds and I think that it provided the only rule which should govern. (See *Matter of N. Y. Institution for Deaf and Dumb*, 121 N. Y. 234.) Under it, it is obvious that the plaintiff could not obtain the redress, which it seeks for its grievance. It does not complain that the assessment is illegal. It complains that the assessment of the stockholders is unequal, as compared with that levied against real estate owners.

I think that the plaintiff's grievance is not one which can be reached by the writ of certiorari; or for which there exists any remedy at law. That being so, is the grievance one as to which the court will be moved to exert its equitable power? Though the right to the use of the writ of certiorari has been so limited by the statute as to be unavailing to the plaintiff's case, the right to appeal to the equitable power of the court may yet exist. That power remains, as it always must remain, inherent in the court, to be exercised in proper cases. That the plaintiff would have the right to invoke its exercise in behalf of its stockholders, I consider to be settled, upon reason, as upon authority. The provisions of the Tax Law, with respect to the collection of taxes assessed against stockholders of banks, in their requirement of the bank to retain, and to pay, from any dividend the tax upon the stock, and the responsible relations thereby created, seem to warrant the maintenance of a suit by the banking corporation in its representative capacity. But its right to do so has been distinctly held by the Supreme Court of the United States, in *Hills v. Exchange Bank*, (105 U. S. 319), and in *Cummings v. National Bank*, (101 ib. 153): In the latter case it was held, in language appropriate to the present plaintiff, that "in paying the

money it is acting in a fiduciary capacity as the agent of the stockholders, an agency created by the statute of the state. If it pays an unlawful tax assessed against its stockholders, they may resist the right of the bank to collect it from them. The bank, as a corporation, is not liable for the tax and occupies the position of a stakeholder, on whom the cost and trouble of the litigation should not fall. If it pays, it may be subjected to a separate suit by each shareholder. If it refuses, it must either withhold dividends and subject itself to litigation by doing so, or refuse to obey the laws and subject itself to suit by the state." It was, further, observed, that the bank "holds a trust relation, which authorizes a court of equity to see that it is protected in the exercise of the duties appertaining to it. To prevent multiplicity of suits, equity may interfere."

What then is the grievance, which the plaintiff asserts, in its appeal to the equitable power of the court in behalf of its stockholders for preventive relief? It is that the commissioners of taxes and assessments of the city of New York have deliberately and intentionally assessed and taxed the real estate in the city, in 1896, at not more than sixty per cent of its actual value, while the shares of stock of the plaintiff have been deliberately and intentionally assessed and taxed at their full value; thus creating an inequality of assessment, whereby the plaintiff's stockholders are called upon to pay an undue portion of the annual taxes for city, county and state purposes. In other words, the grievance amounts to this, that the assessment for taxation on personal estate is at a higher ratio of valuation, than upon real estate, within the city. There is no question of discrimination against national bank stock. The system of taxation as to that form of personal property is in harmony with the taxation of other personal property in the city. The provision of the National Banking Act authorizes the state legislature to determine the manner of taxing national bank stock, provided that such taxation "shall not be at a greater rate than is assessed upon other monied capital in the hands of individual citizens in such state" (U. S. R. S. § 5219),

and this is complied with in the legislative requirement that stockholders in state and national banks shall be assessed and taxed on the value of their shares of stock, which "shall be included in the valuation of their personal property," and "shall not be at a greater rate than * * * upon other moneyed capital in the hands of individual citizens." (Chap. 409, Laws of 1882, § 312.)

The complaint is founded upon the provision of the Revised Statutes of this state that "all real and personal estate liable to taxation shall be estimated and assessed by the assessors at its full and true value," etc., (1 R. S. 393, § 17) and upon the failure of the assessing officers to comply with that provision in assessing real estate. This failure, of course, we must regard as admitted in the case to have been deliberate and intentional on the part of the officers charged by law with the duty of municipal assessments for purposes of taxation. The reasons for the official action complained of do not appear; but it is not alleged to have been fraudulent in any respect, or to have been impelled by a motive to do injustice, or with the purpose of discriminating to the injury of a class of persons, or of a species of property. If the tax commissioners have refused to follow strictly the provision of the Revised Statutes, with respect to the valuation of the taxable real estate in the city, it does not follow that the general burden of taxation, as finally adjusted, has been laid unequally, or inequitably, upon the body of taxpayers. The inequality, which is complained of, is one that is incidental to a general plan of taxation. That is to say, there is no complaint of inequality in the assessment of the taxable personal estate; it is that the taxable real estate is assessed at a different ratio of valuation from that adopted as to personal estate. I do not think that this is an inequality which can constitute a legal grievance; as would be the case, if there had been an unequal valuation of property of the same class. Underlying the governmental power of taxation for the raising of revenues is the principle, implied from the nature of our political institutions, that taxation should be equal, in the sense that there

shall be no discrimination against persons, nor any classification, which results in discrimination, and that the common burden shall be sustained by common contributions, regulated by some fixed general rule, which operates impartially. Is this a case where that principle has been violated? I think not. A general statutory rule has been disregarded by the assessors, in the exercise, presumably, of an honest and reasonable judgment, as nothing is charged to the contrary; but their action was impartial and with reference to the whole community. What discrimination was exercised was, solely, as to the basis of valuation for each of the two classes of property, into which all of the property of the community was divided. That there may be a different basis of valuation in the assessment of real estate from that in the cases of personal estate is, indeed, intimated by the legislature, in the statutory provision above cited from, and, also, in that relating to the taxation of the capital stock of corporations that their real estate shall be deducted at its *assessed* value. (Chap. 409, Laws 1882, § 312; Tax Law of 1896, § 12.) I think we may, fairly, assume that the assessors were influenced by the consideration that an assessment of personal estate is subject to a deduction for the debts of its owner, while real estate is not, and that the latter form of property bears the greater proportion of taxes, for the reason that, unlike personal estate, it cannot be concealed. It is a fact of common knowledge and discussion, that a disproportionate share of the public burdens is thrown on certain kinds of property, because they are visible and tangible; while others are of a nature to elude vigilance. (*Commonwealth v. P. F. C. S. Bank*, 5 Allen, 428, 436.) Such considerations may well influence a board of assessing officers to assess real estate upon a different basis of valuation, in order to equalize the burdens of taxation. Equality is unattainable, and can never be but approximative.

Upon what principle will a court of equity interfere, in a case where the grievance relates to the determination of a political body, acting judicially within the sphere of its juris-

diction? Public policy is against the interference by injunction to restrain the collection of a tax, to the delay and detriment of the public business, (*Western R. R. Co. v. Nolan*, 48 N. Y. 513), and courts should be reluctant to grant such preventive relief, when they are unable to do complete justice by causing a new assessment upon just principles. A court of equity does not sit to enforce the laws of the state; nor will it sit in review of the judgment of a political body, whose judgment, in the assessment of property for taxation, has been honestly exercised. Nor will the collection of a tax be restrained, which is merely erroneous and not void. (See *Mooers v. Smedley*, 6 John. Ch. R. 28; *Livingston v. Hollenbeck*, 4 Barb. 9; *Van Rensselaer v. Kidd*, Ib. 19; *Heywood v. City of Buffalo*, 14 N. Y. 534.) In the system of taxation, which was created for the city of New York by the Consolidation Act of 1882, an official board was provided, with the amplest jurisdiction to hear complaints and with power to act upon appeals, in matters of assessments, as might seem necessary for the equalization of taxation. (Sec. 819.) This fact, together with the limitations upon the right to review by certiorari the decision, or action of the board, seem strongly to evidence a legislative intention that the scheme of assessment of the real and personal estate within the city, for purposes of taxation, should rest, finally, in the wisdom and discretion of the official body, to which it has been confided. How is the court to say that there has not been an equitable adjustment of the burden of taxation, under the rule adopted by the board of commissioners? When assessments for the purposes of taxation are made upon principles applicable alike to all the members of a community, there is substantial equality. If equality is equity, there is no inequity in a general scheme of assessment for taxation, which applies to the whole community and discriminates against no species of property. How the plaintiff's stockholders, in behalf of whom this suit is brought, are affected, individually, by the application of the rule of valuation adopted, we are not informed. They may have had the assessed valuations of their personal estate

reduced by the deduction of their indebtedness. The plaintiff's bank is treated like all other moneyed corporations and its stockholders have the same privileges as are possessed by other holders of personal property. (Chap. 409, Laws of 1882, § 312.) The inequality, of which complaint is made, is one that is general in its nature. If the plaintiff's attack were allowed to prevail, the whole assessment roll might be invalidated and serious embarrassment might be caused to governmental operations. I do not think that the exercise of the equitable power of the court can be invoked to accomplish the subversion of a general scheme of assessment and taxation, which has been adopted by the department of government constituted for the purpose.

The cases in the United States Supreme Court, to which our attention has been directed, as justifying the intervention of equity, do not conflict with these views. They differ in essential facts. Either they relate to the statutory conditions, which resulted in an injurious discrimination against a class of persons, or a species of property; or to acts of assessors, having a clear purpose to discriminate against shares of bank stock. (*Stanley v. Supervisors*, 121 U. S. 535; *Cummings v. National Bank*, 101 ib. 153; *People v. Weaver*, 100 ib. 539.) Equity will go far to afford relief in cases of mistake; or for the prevention of fraud; or to secure to the citizen the equal protection of the laws; but it is not its province to interfere with the collection of a tax, in a case where the grievance assigned does not relate to some question of fraud, or of illegal discrimination, or classification.

For the reasons stated, I advise the affirmance of the judgment appealed from, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ., concur.

Judgment affirmed.

In the Matter of the Application of THE NEW YORK JUVENILE
ASYLUM, Appellant, for a Writ of Mandamus.

JOHN W. KELLER, as Commissioner of Public Charities in the
City of New York, Respondent.

1. CHARITABLE INSTITUTIONS — PAYMENTS OF PUBLIC MONEYS TO INSTITUTIONS WHOLLY OR PARTLY UNDER PRIVATE CONTROL — RULES OF THE STATE BOARD OF CHARITIES. A municipal corporation is prohibited by the Constitution (Art. 8, § 14) and the statutes (L. 1895, ch. 754; L. 1896, ch. 546, § 9, subd. 8), from paying public moneys to a charitable institution wholly or partly under private control, for the care, support and maintenance of inmates who are not received and retained therein pursuant to the rules established by the state board of charities for the purpose of determining whether such inmates are properly a public charge.

2. NEW YORK JUVENILE ASYLUM — CHARTER PROVISION REQUIRING PAYMENT BY THE CITY AND COUNTY OF NEW YORK FOR THE SUPPORT OF INMATES NOT COMMITTED TO IT IN ACCORDANCE WITH RULES OF STATE BOARD OF CHARITIES. SUPERSEDED BY THE CONSTITUTION. The fact that the New York Juvenile Asylum, a private charitable institution, was authorized by its charter (L. 1851, ch. 332) to take under its care the management of such children as should by the consent, in writing, of their parents or guardians, be voluntarily surrendered and intrusted to it, and by section 28 of chapter 245 of the Laws of 1866 might require the county of New York to pay annually a specified sum for the support of children so committed to it, which section was incorporated into the charter of Greater New York (L. 1897, ch. 378, § 230) and has not in terms been repealed, amended or modified, does not authorize the city and county of New York to pay for the support and maintenance of any inmate not received and retained therein pursuant to the rules of the state board of charities, since such payment is prohibited, not by the rules effecting the repeal or amendment of the statute conferring the right thereto, but by the Constitution itself, which superseded the statute and operated presently from the time the rules were established.

Matter of New York Juvenile Asylum, 69 App. Div. 615, affirmed.

(Argued June 11, 1902; decided October 7, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered February 27, 1902, which affirmed an order of Special Term denying an application for a writ of mandamus to compel the commissioner of public charities to certify that a cer-

tain inmate of the petitioning asylum was a proper public charge.

The facts, so far as material, are stated in the opinion.

Robert Goeller for appellant. The new rule of the state board of charities deprives the juvenile asylum of the right to receive children by surrender as a public charge, a power granted to the juvenile asylum by the legislature, and to that extent repeals the asylum's charter. To have the power directly to repeal an act of the legislature, the state board of charities must derive its authority either from the legislature itself or from the Constitution. (*Van Denburgh v. Village of Greenbush*, 66 N. Y. 1; *Matter of D. & H. C. Co.*, 69 N. Y. 209; *Matter of Evergreens*, 47 N. Y. 216; *McKenna v. Edmunstone*, 91 N. Y. 231; *B. C. Assn. v. Buffalo*, 118 N. Y. 61; *People ex rel. v. Knox*, 166 N. Y. 444; *People v. Henry*, 47 App. Div. 133; *People v. Dalton*, 31 Misc. Rep. 296; 31 App. Div. 630; *People v. Grant*, 37 N. Y. 630; *Gormerly v. McGlynn*, 84 N. Y. 284.) While the Constitution granted power to the state board of charities to make rules for the reception and retention of inmates by charitable institutions subject to the control of the legislature by general laws, and the legislature in pursuance thereof, by the act of 1895, in terms granted the same power to it, yet it cannot be contended that such power included authority to enact rules which would abrogate existing laws. (*People ex rel. v. Keller*, 99 N. Y. 479; *Bertholf v. O'Reilly*, 74 N. Y. 509; *Bank of Chenango v. Brown*, 26 N. Y. 467; Const. of N. Y. art. 1, § 16, art. 3, § 1; *Barto v. Hinrod*, 8 N. Y. 483; *P. R. R. Co. v. Memphis R. R. Co.*, 10 Wall. 38; *Parker v. Comm.* 6 Penn. St. 507; Sedgwick on Const. 165; *Wayman v. Southard*, 10 Wheat. 46; 18 N. Y. 41; 23 N. Y. 448; 26 N. Y. 473; 28 N. Y. 635; 92 N. Y. 315; *State v. Circuit Judge*, 50 N. J. L. 585.)

George L. Rives, Corporation Counsel, *Theodore Connolly* and *Charles A. O'Neil* for respondent. The rule of the state board of charities attacked is a valid exercise of the power

conferred upon said board by the Constitution and laws of the state of New York. (*People ex rel. v. Comptroller*, 152 N. Y. 399; *People ex rel. v. Fitch*, 154 N. Y. 14; *Matter of O. L. & Co.'s Bank*, 21 N. Y. 1; *People v. O'Brien*, 111 N. Y. 1; *L. & N. R. R. Co. v. Kentucky*, 183 U. S. 503.) There is no limitation upon the power of the state board of charities to make rules except that such rules shall be subject to the control of the legislature by general laws. (*Mayor, etc., v. T. T. S. R. R. Co.*, 113 N. Y. 311; *B. Co. v. Massachusetts*, 97 U. S. 25; *Budd v. New York*, 143 U. S. 517, affg. 117 N. Y. 1; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Stone v. Mississippi*, 101 U. S. 814; *Butchers' Union v. Crescent City Co.*, 111 U. S. 746; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *Powell v. Pennsylvania*, 127 U. S. 683; *Douglas v. Kentucky*, 168 U. S. 488.) The constitutional provision applies to petitioner. (*People ex rel. v. Dalton*, 158 N. Y. 175.)

HAIGHT, J. On or about the 5th day of August, 1901, Mamie Schellberger, a minor of the age of thirteen years, was surrendered to the New York Juvenile Asylum by her mother as an ungovernable child. She was received by the board of directors of the asylum and for the remainder of the month was retained therein, after which time the asylum, in accordance with its custom, rendered a bill to the commissioner of public charities for the support of the child in order to obtain a certificate that the child was a proper public charge, and that the asylum was entitled to its pay therefor by the comptroller of the city of New York. The commissioner of public charities refused to give the certificate called for, upon the ground that the child had not been committed to the asylum in accordance with the rules established by the state board of charities; thereupon this proceeding was instituted to compel the commissioner to give the certificate called for.

The New York Juvenile Asylum was incorporated by special act of the legislature in the year 1851, by chapter 332

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

of the laws of that year. Its object was the reception of children between the ages of five and fourteen years, to provide for their support and to afford them the means of a moral, intellectual and industrial education. The corporation was authorized to take under its care the management of such children as should by the consent, in writing, of their parents or guardians be voluntarily surrendered and intrusted to it; also such children as should be committed to its charge by order of any magistrate of the city and county of New York; and also such children as should be found in the streets, highways and public places in the city in circumstances of want, suffering, abandonment, exposure, neglect or vagrancy.

By an amendment of the act of incorporation in 1866, chapter 245, section 28, the board of supervisors of the county were required in each year to levy and collect by tax and to pay over to the asylum one hundred and ten dollars per annum, or proportionately for any fraction of the year, for each child which, by virtue and in pursuance of the provisions of the act, "shall be intrusted or committed to the said asylum and shall be supported and instructed therein." This section of the statute was subsequently incorporated into the Greater New York charter, section 230, which is the statute upon which the petitioner bases its claim for support of the child, Mannie Schellberger. Under this statute claims of this character have been paid for many years, and unless it has been repealed, amended or modified by the imposition of conditions, it furnishes authority for the payment of the petitioner's claim.

The Constitution of 1895, article 8, section 11, provides that "The legislature shall provide for a state board of charities, which shall visit and inspect all institutions, whether state, county, municipal, incorporated or not incorporated, which are of a charitable, eleemosynary, correctional or reformatory character * * *."

Section 13. "Existing laws relating to institutions referred to in the foregoing sections, and to their supervision and inspection, in so far as such laws are not inconsistent with the

provisions of the Constitution, shall remain in force until amended or repealed by the legislature * * *."

Section 14. "Nothing in this Constitution contained shall prevent the Legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper; or prevent any county, city, town or village from providing for the care, support, maintenance and secular education of inmates of orphan asylums, homes for dependent children or correctional institutions, whether under public or private control. Payments by counties, cities, towns and villages to charitable, eleemosynary, correctional and reformatory institutions, wholly or partly under private control, for care, support and maintenance, may be authorized, but shall not be required by the Legislature. *No such payments shall be made for any inmate of such institutions who is not received and retained therein pursuant to rules established by the state board of charities.* Such rules shall be subject to the control of the Legislature by general laws."

Pursuant to these provisions of the Constitution the legislature in 1895, chapter 754, authorized cities, towns and villages in their discretion to appropriate and raise money by taxation and to pay the same over "to charitable, eleemosynary, correctional and reformatory institutions wholly or partly under private control, for the care, support and maintenance of their inmates, of the moneys which are or may be appropriated therefor; *such payments to be made only for such inmates as are received and retained therein pursuant to rules established by the state board of charities,*" and again by the Laws of 1896, chapter 546, section 9, subdivision 8, provided that the said board of charities shall "establish rules for the reception and retention of inmates of all institutions which, by section 14 of article 8 of the Constitution, are subject to its supervision."

Section 230 of the Greater New York charter, as amended by chapter 466 of the Laws of 1901, authorized the board of estimate and apportionment in its discretion to annually

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

include in its estimate, to be raised and appropriated, various sums of money for institutions therein specifically named, among which, by subdivision 14, is the New York Juvenile Asylum; but by the concluding subdivision 24 of the section it is provided that payments were to be made "*only for such inmates as are received and retained therein pursuant to rules established by the state board of charities.*" Again by the same charter, section 658, a department of public charities was created and the head of the department was called the "commissioner of public charities." Such commissioner was given jurisdiction over all the hospitals, almshouses and other institutions belonging to the city, with power to commit children who may become a public charge to *any institution incorporated for charitable purposes*, and to reimburse such societies and corporations for the expense incurred in the support of such children (sections 660 and 664); but by section 661 it is provided that "No payment shall be made by the city of New York to any charitable, eleemosynary or reformatory institution wholly or partly under private control, for the care, support, secular education, or maintenance of *any child surrendered to such institution*, or committed to, received or retained therein in accordance with section 664, * * * except upon the certificate of the commissioner of public charities that such child has been received and is retained by such institution pursuant to the rules and regulations established by the state board of charities."

The state board of charities, pursuant to the provisions of the Constitution and of the statutes to which we have called attention, established rules which, so far as is material upon the question under consideration, are as follows:

"I. THE RECEPTION OF INMATES.

"The following classes of persons and no others may be received as public charges into charitable, eleemosynary, correctional and reformatory institutions wholly or partly under private control, authorized by law to receive payments from

any county, city, town or village for the support, care and maintenance of inmates. * * * 4. * * * No child between the ages of two and sixteen years, unless convicted of crime, shall be received into any such institution as a public charge unless committed thereto or placed therein by a court or magistrate having jurisdiction, or by the superintendent of the poor of a county, or overseer of the poor of a town, or commissioner or commissioners of charities, or other local officer or board legally exercising the powers of an overseer in the county, city, town or village sought to be charged with the support of such child and authorized by law to commit children to such institution or to place them therein."

As we have seen, Mamie Schellberger was placed in the New York Juvenile Asylum by her mother. She had not been convicted of any crime and was not committed by any court or magistrate, or by the commissioner of charities of the city of New York who legally exercised the powers of an overseer of the poor in counties. It is not alleged that this child was a poor person or that her mother was unable to support her, and thus far there has been no adjudication that she was a proper public charge. It will thus be seen that the claim of the asylum rests upon the provision of its charter giving parents the right of surrendering their children to it, and the provisions of the statute authorizing the city of New York to pay it one hundred and ten dollars a year for each child so given to its charge and custody.

In answer to this the city invokes the rule established by the state board of charities to which we have referred. The asylum contends that this rule is illegal, unauthorized and void. If this rule is to be construed as effecting the repeal of the statute we should hesitate about sustaining its validity. The Constitution and the legislature, by the acts to which we have referred, have authorized the state board of charities to make rules, but such rules are subject to the control of the legislature by general laws. By authorizing the board to make rules the legislature has not delegated to it any of its powers to enact or to repeal laws, and, doubtless, no such power was

contemplated by the constitutional provision to which we have referred. This is evident from the concluding clause, which subjects the rules of the board to the control of the legislature.

The Constitution is the supreme law of the state, and before it all statutes must fall that are in conflict with its provisions. The first provision to which we have called attention preserves statutes until amended or repealed by the legislature, which are not inconsistent with its provisions. The next section to which we have referred gives to the legislature the power to authorize counties, cities, towns and villages to make appropriations for charitable institutions wholly or partly under private control, but prohibits the legislature from requiring such appropriations. In other words, cities may be authorized to make donations to charitable institutions, but they must be left free to exercise their own judgment as to the amount and character of the charities they shall bestow; but no payments shall be made for any inmate of a charitable institution under private control who is not received and retained therein pursuant to the rules established by the state board of charities. Here we have an express prohibition with reference to payments made for inmates of such institutions. Under the charter of the asylum the city of New York was required to pay one hundred and ten dollars per annum for each child surrendered to its care by its parents, or committed to it by an officer authorized to commit children to such institutions. Under this statute there was no discretionary power vested in the common council or board of supervisors. The payment was required to be made by the act of the legislature, and it was subject to no rules or regulations of any board; but the provisions of the Constitution effected a change of the statutes in these particulars. The payment of one hundred and ten dollars per annum can no longer be required by the legislature; it can only authorize the city to make it, leaving it free to act through its constituted authority and to make the payment or not in its discretion. Not only this but it changes the provision of the statutes

by prohibiting payments, unless the conditions specified in the Constitution are complied with. What are these conditions? They have been repeated time and again in the statutes, as well as in the Constitution. There was a purpose sought to be accomplished; this purpose appears from the discussions that were engaged in by the members of the constitutional convention in which this provision was framed. Mr. Choate, the president of the convention, spoke at some length when this provision was under consideration, and, among other things, stated that in the city of New York, as it then existed before its enlargement, there were eighteen thousand children in these asylums supported by charity, many of whom were placed there without commitment by parents who were perfectly able to support them; and that these provisions had been framed for the purpose of preventing this abuse and the wrongful appropriation of the public moneys. It is thus apparent that the object and purpose of the provision was that there should be some means provided for determining whether the inmates of these asylums were properly a public charge. This duty the Constitution delegated to the state board of charities, but subject to legislative control. It impaired no legislative function; it merely involved an inquiry as to the condition of the inmates in regard to their financial responsibility or that of their parents or guardians. It doubtless was not deemed practicable for the board itself to investigate and determine the financial condition of each inmate of these asylums throughout the state, consequently it was given power to adopt rules and to specify officers by whom these questions could readily be determined.

It is not the rule that repeals or amends the statute; it is the Constitution itself that effects the change. If the Constitution had provided that no payments should be made for the support of infants in these asylums, except upon an order of the court adjudging that the person for whom payment is sought was properly a public charge, it would hardly be contended that the court in determining the question was in effect repealing the statute. To our minds no greater force can be

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

given to the action of the state board of charities. It has adopted rules as it was required to do by the provisions of the Constitution and of the statutes, to which we have referred. It is the Constitution that gives life and force to these rules and it is the Constitution that places limitations upon the payments that the statutes had previously authorized and required. The Constitution itself does not provide the means for the determination of the question as to whether the children in these institutions are properly a public charge; that function, as we have seen, devolves upon the state board of charities. Until, therefore, the state board of charities takes action in the matter and provides the means by adopting rules, the constitutional provision may not be self-executing; but as soon as the board takes action and adopts the rules, then the Constitution acts presently upon the existing statutes and all payments thereafter made must be in accordance with its provisions. This was asserted by Chief Judge ANDREWS in the case of *People ex rel. Inebriates' Home for Kings County v. Comptroller of the City of Brooklyn* (152 N. Y. 399-410), who, after referring to this provision of the Constitution, says: "We entertain no doubt that this prohibition operated presently, that is to say, that from the time rules should be established by the State Board regulating the reception and retention by charitable institutions, no payments would be justified for the care, support and maintenance of inmates received or retained in contravention of the rules of the board."

So in the case of *People ex rel. New York Institution for the Blind v. Fitch* (154 N. Y. 14-38) in which it was again asserted that this provision of the Constitution operated presently from the time rules were established by the state board of charities; and in addition thereto, MARTIN, J., in delivering the opinion of the court, says: "This declaration of the organic law is plain and unambiguous, and expressly forbids the appropriation of money by the counties and cities of the state to any such purpose, unless the inmates are received and retained in the manner stated. Its manifest purpose is to make all appropriations of public moneys by the

local political divisions or municipalities of the state to institutions under private control, subject to the supervision and rules of the state board of charities."

There is nothing in these provisions which affects the rights of parents or guardians in surrendering their children or wards to the custody of the asylum for support and education, if they so desire. The asylum may still receive such children and support them at the expense of their parents or guardians, or of such charitable fund as may be in its possession for that purpose. They are only prohibited from collecting pay from the city for the support of these children until the commissioner of charities of the city, or of some court having jurisdiction, has committed them to the asylum as proper subjects of a public charge. This imposes no great hardship on the asylum, and it protects the city from the frauds which may be practiced upon it by those who are able to support and educate their own children.

These views render it unnecessary at this time to consider the effect of the various statutes to which attention has been called.

The order appealed from should be affirmed, with costs.

PARKER, Ch. J., GRAY, O'BRIEN, VANN, CULLEN and WERNER, JJ., concur.

Order affirmed.

TERESA RICE, Respondent, v. MARVIN A. CULVER, Appellant and JULIUS FRIEDERICH, Respondent, Impleaded with Others.

1. MECHANIC'S LIEN — LANDLORD NOT LIABLE FOR IMPROVEMENTS MADE BY TENANT FOR SOLE BENEFIT OF TENANT UNDER PROVISIONS OF LEASE. The owner of land leased for a term of years at a fixed rental to a corporation for a purpose prescribed in the lease, the lessee to have the right to remove at any time before the expiration of the lease all buildings and structures erected by it upon the land, is not liable under the Mechanics' Lien Law (L. 1897, ch. 418, art. 1) for any work done in and upon the buildings erected by the lessee after the execution of the written lease, where there is no evidence that the land-

172	60
172	1891
172	1898
172	60
172	630

N. Y. Rep.]

Statement of case.

owner exercised any control or supervision over the performance of the work and where, under the terms of the lease, the work was in no way in the interest of such owner, notwithstanding the fact that the landowner signed an application to the local authorities to have the premises connected with the city water supply, presumably because of some rule or requirement by the city officials that the application should be made by the owner, since to fall within the provision of the statute the owner must be an affirmative factor in procuring the improvement to be made, or, having possession and control of the premises, assent to the improvement in the expectation that he will reap the benefit of it.

2. LANDLORD LIABLE FOR IMPROVEMENTS MADE BY TENANT BEFORE EXECUTION OF LEASE AND BEFORE POSSESSION OF PROPERTY GIVEN TO TENANT. Such owner is liable, however, under the statute, for work done in grading the premises at the instance of the lessee, with the knowledge of the owner, before the date and execution of the lease, where there is no evidence which would justify a finding that the lessee had entered into possession of the premises before the date of the lease, or, that before that time, the owner had surrendered the control and possession of the property to the lessee, since the fact that the owner, being in control and possession of the land, knowingly suffered beneficial improvements to be made upon it renders his property liable for the work.

Rice v. Culver, 57 App. Div. 552, modified.

(Argued May 20, 1902; decided October 7, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 21, 1901, reversing a judgment in favor of defendant Culver entered upon a decision of the court on trial at Special Term and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles M. Williams for appellant. The defendant Culver or his lands are not liable for respondent's liens. (*De Klyn v. Gould*, 165 N. Y. 282; *Vosseller v. Slater*, 25 App. Div. 368; 163 N. Y. 564; *Havens v. W. S. E. L. & P. Co.*, 44 N. Y. S. R. 589; 49 N. Y. S. R. 771; 143 N. Y. 632; *Spruck v. McRoberts*, 139 N. Y. 199; *Hankinson v. Vantine*, 152 N. Y. 20, 29; *Cowen v. Paddock*, 137 N. Y. 188; L. 1897, ch. 418, §§ 2, 3, 4; *McCauley v. Hatfield*, 59 N. Y. S. R. 552; *Ross v. Simon*, 28 N. Y. S. R. 147; *Booth v. Kehoe*, 71 N. Y. 341; *Woodhull v. Rosenthal*, 61 N. Y. 397.) The

improvements made by the respondents do not, under the terms of the lease, become part of the real estate; and the appellant Culver cannot be held liable by reason of the character of the work of the respondents. (*N. Y. I. Co. v. Cosgrove*, 47 App. Div. 36; *Moore v. McLaughlin*, 11 App. Div. 477; *Ombony v. Jones*, 19 N. Y. 234; *Vogel v. Farrand*, 26 Misc. Rep. 130; *N. Y. I. Co. v. Allison*, 107 Fed. Rep. 182; *Matter of Welch*, 108 Fed. Rep. 367; *Mass. Bank v. Shinn*, 18 App. Div. 279; *Regan v. Borsth*, 11 Misc. Rep. 92; *Conklin v. Bauer*, 62 N. Y. 620; *Craig v. Swinerton*, 8 Hun, 144; *Cornell v. Barney*, 26 Hun, 134; 94 N. Y. 394.)

John H. Hopkins for Teresa Rice, respondent. If the owner of real estate consent that work be done and materials used thereon, with knowledge of the purpose for which they are designed, and if the product of the work and materials become part of the real estate, the owner's interest is subject to a lien. (*Husted v. Muthes*, 77 N. Y. 388; *Nellis v. Beltinger*, 6 Hun, 560; *Burket v. Harper*, 79 N. Y. 273; *Cornell v. Banley*, 26 Hun, 134; *McLean v. Sanford*, 26 App. Div. 603; *Lowry v. Woolsey*, 83 Hun, 257; 146 N. Y. 375; *Pell v. Bauer*, 133 N. Y. 377; *Decker v. Sexton*, 19 Misc. Rep. 59; *Mosher v. Lewis*, 14 App. Div. 565; *N. I. M. Co. v. Upham*, 26 App. Div. 420.) The improvements made by the plaintiff and the defendant Friederich became, necessarily, part of the real estate. No agreement between the lessor and lessee could turn them into chattels, even as between themselves, and still less as to third persons. Some of the improvements were not susceptible of removal; and even where removal by the lessee was possible, it could be effected, not because the improvements were personal property by virtue of an agreement between lessor and lessee, but because that agreement enabled the lessee to sever from the freehold and remove a portion of the real estate. (*Ford v. Cobb*, 20 N. Y. 344; *Ombony v. Jones*, 19 N. Y. 234; *H. & D. L. Co. v. Murray*, 47 App. Div. 289.)

N. Y. Rep.] Opinion of the Court, per CULLEN, J.

W. H. Sullivan for Julius Friederich, respondent. Friederich is entitled to a lien as against Culver, he having consented to such work, and the judgment appealed from as to Friederich should be affirmed. (L. 1897, ch. 418, §§ 2, 3; *N. W. P. Co. v. Sire*, 163 N. Y. 122; *Mosher v. Lewis*, 10 Misc. Rep. 373; *Hartley v. Murtha*, 36 App. Div. 196; *De Klyn v. Simpson*, 34 App. Div. 436; *Nellis v. Bellinger*, 6 Hun, 560; *Husted v. Mathes*, 77 N. Y. 388; *Cowen v. Pad-dock*, 137 N. Y. 193.)

CULLEN, J. This action is brought to enforce a mechanic's lien filed by the plaintiff against certain lands in the city of Rochester owned by the appellant. The defendant Friederich is also a lienor. In the spring of 1898 the appellant entered into negotiations for the lease of the premises, which consisted of a tract of about twenty-one acres of land, to the defendant corporation, The Rochester Exhibition Company. These negotiations culminated in a written lease bearing date the 10th day of April, which was executed by the appellant on the 20th day of April and by the exhibition company on the 28th day of April. The work for which the plaintiff's lien was filed consisted of plumbing work and material, and was furnished under a contract between her and the exhibition company dated April 27th. The work was begun on April 28th. The lien of the respondent Friederich was for grading the premises and clearing them of trees. It was also performed under a contract with the exhibition company. The work was begun about the 14th day of March. The lease from the appellant Culver to the defendant exhibition company was for a term ending December 31st, 1902, with the privilege of an extension. It provided that the lessee should not use the premises or permit the same to be used "for any other purpose than the construction, use and maintenance of a general athletic field, with appurtenances; the holding of general athletic games and events, and public amusements and enterprises." It further provided that the lessee should, at the termination of the lease, deliver up the

premises in as good condition as when taken, except the trees necessarily removed by the lessee in preparing the property for its use. The lessee was given the right to remove at any time during the lease all buildings, erections and improvements which it might at any time erect or place on the land. On obtaining the lease the exhibition company erected extensive buildings and structures on the premises. For that work other liens were filed besides those of the plaintiff and the defendant Friederich. The trial court found that the appellant did not consent, within the meaning of the statute, to the improvements made by the lessee and rendered judgment in his favor against all the lienors. From that judgment the plaintiff and the defendant Friederich appealed to the Appellate Division, where the judgment of the Special Term, so far as it affected their claims, was reversed and a new trial ordered. From that order the appellant Culver appeals to this court.

The Appellate Division reversed the judgment of the Special Term both on the facts and the law, and, therefore, if there was any evidence in the case from which the court might find that the appellant consented, within the meaning of the statute, to the performance of the work for which the respondents claimed liens, the order of the Appellate Division must be affirmed or the appeal dismissed, as we have no jurisdiction to review questions of fact. If, on the other hand, there was no evidence to support a finding of consent by the appellant, then the order of the Appellate Division was erroneous and the judgment of the Special Term should be reinstated. We think that there is no evidence in the case which would have justified a decision by the Special Term in favor of the plaintiff. The statute (§ 3, ch. 418, Laws of 1897) provides: "A contractor, sub-contractor, laborer or materialman, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or sub-contractor, shall have a lien for the principal and interest of the value, or the agreed price, of such

N. Y. Rep.] Opinion of the Court, per CULLEN, J.

labor or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed in this article." The question to be determined in this case is the meaning to be given to the term "consent." Doubtless, in a certain sense of the word, the appellant did consent to the performance of the work done on his property, for at the time of the execution of the lease he must have known that the lessee intended to make erections thereon in order to use the premises for the purposes for which they were let. But a similar situation is presented in the great majority of demises of real property. If there is a building on the premises the tenant is, in the absence of an express covenant on the subject, required to keep the premises in ordinary repair. (1 Taylor on Landlord and Tenant, § 43; *Suydam v. Jackson*, 54 N. Y. 450.) It seems that in this state a tenant may erect a new edifice on demised premises, provided it can be done without destroying or materially injuring other improvements, without the consent of the landlord or being subject to the charge of waste. (*Winship v. Pitts*, 3 Paige, 259.) Even in the case of existing structures, while the law precludes with some strictness the tenant from making alterations, there is a large field in which he may, without the permission of the landlord, make improvements beneficial to his use, unless they constitute a permanent injury to the estate. It could not have been intended by the legislature (if it had the power) to enact that by the mere demise of land the property of the owner should be subjected to the cost of structures or improvements which the tenant would have the right to erect by virtue of his estate under the lease. There is a marked distinction between the passive acquiescence of an owner in that he knows the improvements are being made, improvements which in many cases he has no right to prevent, and his actual and express consent or requirement that the improvement shall be made. It is the latter that constitutes the consent mentioned in the statute. To fall within that provision the owner must either be an affirmative factor in procuring the improvement to be

made, or having possession and control of the premises assent to the improvement in the expectation that he will reap the benefit of it. It was well said by Justice FOLLETT in *Vosseller v. Slater* (25 App. Div. 368; affirmed, 163 N. Y. 564): "The term 'with the consent of the owner,' as used in the statute, implies that the owner has power to give or withhold his consent in respect to the construction, alteration or reparation of the building. In case the vendor in an executory contract has no authority to require the vendee to build, alter or repair, and has no power to prevent him from doing so, his interest cannot be charged with a mechanic's lien for the erection, reparation or improvement of a building, ordered by the vendee simply because he (the vendor) knowing that the work has to be done and knowing that it is being done, does not try to stop what he has no power to prevent." In *Hankinson v. Vantine* (152 N. Y. 20) the lease provided that the tenant should not make any alterations in the premises without the consent of the lessor under penalty of forfeiture and damages. Subsequently the landlord released the tenant from this covenant and agreed that he should have the right to make alterations and improvements in the building. It was held that this did not render her estate liable for improvements or alterations in the procurement of which she did not participate. It was there said by Judge MARTIN: "The simple fact that the appellant gave Riker (tenant) the abstract right to make alterations in her store at his own expense, of which consent the plaintiff had no knowledge, by no means amounted to a consent by her that the plaintiff should furnish labor or materials to be employed in making alterations upon her property, especially in the absence of any notice or knowledge on her part from which such consent could be implied." Tested by the principle of the cases cited, the evidence is insufficient to show that the appellant consented to the performance by the plaintiff of the work for which her lien was filed. There was nothing in the lease itself that operated as such a consent. The case is entirely different from those in which the tenant covenanted by the

N. Y. Rep.] Opinion of the Court, per CULLEN, J.

lease to erect buildings or make improvements. (*Burkitt v. Harper*, 79 N. Y. 273; *Otis v. Dodd*, 90 N. Y. 336; *Jones v. Menke*, 168 N. Y. 61; *Hilton & Dodge Lumber Co. v. Murray*, 47 App. Div. 289.) In those cases the estate of the landlord was properly held liable because not only did he require the improvement to be made, but the improvement inured to his benefit, either because it reverted to him at the expiration of the demised term or because his rent proceeded from its use. Here the landlord was to receive a fixed rent. It is true the lessee covenanted not to use the premises for other purposes than those prescribed in the lease, but it was not required that they should be used for those purposes. All structures or buildings erected by the lessee were to belong to and be removable by it. So long as the landlord received his rent it was immaterial to him whether the premises lay idle and unimproved or not. It is claimed that the appellant rendered his property liable because he signed an application to the local authorities to have the premises connected with the city water supply. The permit from the city was in no way a prerequisite to the construction of the plumbing furnished by the plaintiff, however necessary it might have been in order to connect that plumbing with the water supply. We presume that the appellant made the application because of some rule or requirement by the city officials that it should be made by the owner. We imagine that the tenant, as an occupant of the land, could have compelled the city to supply it with water on complying with reasonable conditions and security for the payment of the water rates, even though the owner had refused to join in the application. However this may be, the act of the appellant in thus aiding his tenant in procuring the supply of water did not operate to make him liable for the improvements made by the tenant.

It appears by the opinion of the learned Appellate Division that that court felt constrained by the authority of *National Wall Paper Company v. Sire* (163 N. Y. 122) to reverse the judgment of the Special Term. We think that the case is

plainly distinguishable from the one before us. There the work, which consisted of the decoration of the demised premises for the purpose of a hotel and restaurant, inured to the benefit of the landlord, who regained possession immediately after the work was completed. The landlord supervised and directed the performance of the work. His acts and conduct were such as to authorize the finding by the trial court that he actually participated in procuring the work to be done. This case is barren of the features alluded to. The appellant exercised no control or supervision over the performance of plaintiff's contract. The most he did was to express satisfaction at the manner in which the work was being performed. But this satisfaction or approval evidenced no intention to intervene in the conduct of the work, for under the terms of the lease the work was in no way in his interest. We think there was no evidence in the case authorizing the reversal of the judgment of the Special Term in favor of the appellant as against the plaintiff, and that the order of the Appellate Division should be reversed and the judgment of the Special Term affirmed, with costs.

The facts relating to the claim of the respondent Friederich differ materially from those under which the plaintiff's work was rendered. Friederich began the performance of his contract on March 14th. The lease from the appellant to the exhibition company bears date April 10th, but was not executed by either party till several days later. I think there is no evidence which would justify a finding that the exhibition company entered into possession of the premises as a tenant earlier than April 10th, or that before that time the appellant surrendered his control and possession of the property. It is sufficient, however, to say that in the view most favorable to the appellant the court might have found that the appellant was in possession and control at the time the respondent Friederich did his work; and, therefore, for the disposition of this appeal we must assume that the trial court would have so found. We may concede that some of the work done by that respondent did not create any permanent benefit to the

N. Y. Rep.]

Statement of case.

land, but a portion of it, consisting of removing stone and grading, was beneficial to the estate. Here again the case in the aspect most favorable to the appellant presents simply the question of fact whether the work was beneficial or not. Therefore, a trial court might have found that the appellant being in control and possession of his land knowingly suffered beneficial improvements to be made upon it. We think that these facts would, under the authorities, render his property liable for the work. (*Nellis v. Bellinger*, 6 Hun, 560; *Husted v. Mathes*, 77 N. Y. 388. See also opinion of FOLLETT, J., in *Vosseller v. Slater*, *supra*.)

The order of the Appellate Division reversing the judgment and granting a new trial in favor of the defendant Friederich should be affirmed and judgment absolute rendered in that defendant's favor against the appellant, with costs.

HAIGHT, MARTIN, VANN and WERNER, JJ., concur; PARKER, Ch. J., and BARTLETT, J., dissent solely from the affirmance of the order in favor of the defendant Friederich.

Ordered accordingly.

In the Matter of the Appraisal, under the Transfer Tax Act,	172	69
of the Estate of CORNELIUS VANDERBILT, Deceased.	1172	610

THE COMPTROLLER OF THE STATE OF NEW YORK, Appellant;	1172	612
WILLIAM K. VANDERBILT et al., as Executors et al.,	172	615
Respondents.	77 AD	360

1. TAX—TRANSFER TAX UPON CONTINGENT REMAINDERS PAYABLE FORTHWITH OUT OF PROPERTY TRANSFERRED. The rule that future contingent estates are not taxable under the Transfer Tax Act (L. 1896, ch. 908, § 230; amd., L. 1897, ch. 284) until they vest in possession and the beneficial owner ascertained, has been changed by chapter 76 of the Laws of 1899, which provides that "When property is transferred in trust or otherwise, and the rights, interests or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable

Statement of case.

[Vol. 172.]

forthwith, out of the property transferred," so that the tax is payable forthwith out of the property transferred, and whoever may ultimately take the property takes that which remains after its payment. The tax is not upon property, but still remains a tax upon succession.

2. METHOD OF IMPOSING TAX. An estate in trust created by will for specified periods, with a remainder vested in the beneficiary subject to be defeated by his death before the expiration of such periods, must be separately appraised and the transfer tax determined according to the percentage fixed by the statute for those who are contingently entitled to the estate, and when fixed the tax is forthwith payable out of the trust estate.

Matter of Vanderbilt, 68 App. Div. 27, modified.

(Argued June 12, 1902; decided October 7, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 12, 1902, which affirmed an order of the New York County Surrogate's Court assessing a transfer tax upon the estate of Cornelius Vanderbilt, deceased.

The facts, so far as material, are stated in the opinion.

G. D. B. Hasbrouck for appellant. The surrogate erred in refusing and neglecting to tax the transfers of remainders made by the 17th clause of the will of Cornelius Vanderbilt. (*Matter of Sherman*, 153 N. Y. 4; *Knowlton v. Moore*, 178 U. S. 55; *Matter of Knoedler*, 140 N. Y. 380; *Murdock v. Ward*, 178 U. S. 146; *Eyre v. Jacob*, 14 Gratt. 430; *Strode v. Commonwealth*, 52 Penn. St. 185, 189; *Schooley v. Rev.*, 23 Wall. [U. S.] 331; *Miller v. Miller*, 18 Hun, 507; *Matter of Dows*, 167 N. Y. 231; *Plummer v. Ward*, 178 U. S. 115.)

Chandler P. Anderson and *Henry B. Anderson* for respondents. No tax can be assessed upon estates or interests in expectancy which are contingent or defeasible until they vest absolutely in possession or enjoyment. (*Matter of Gould*, 156 N. Y. 423; *Matter of Curtis*, 142 N. Y. 219; *Matter of Roosevelt*, 143 N. Y. 120; *Matter of Hoffman*, 143 N. Y. 327; *Matter of Davis*, 149 N. Y. 539; *Matter of Gibson*,

N. Y. Rep.]

Opinion per HAIGHT, J.

157 N. Y. 680.) The rule established by the cases cited, so far as it applies to the case at bar, has not been changed by the amendment of 1899 to section 230 of the Tax Law, either with respect to the character of the tax imposed, the method of its computation, or the date of its assessment. (*Matter of Howell*, 34 Misc. Rep. 434; *Matter of Pell*, 171 N. Y. 56.) The act does not impose a tax with respect to property subject to a power of appointment until the exercise of the power. (*Matter of Dows*, 167 N. Y. 227.) The facts of the case at bar bring it exactly within the application of the rules above stated. (*Warner v. Durant*, 76 N. Y. 133; *Steinway v. Steinway*, 163 N. Y. 197; *Zartman v. Ditmars*, 37 App. Div. 173; *Vuodry v. Geddes*, 1 R. & M. 203; *Smith v. Edwards*, 88 N. Y. 107; *Dimmick v. Patterson*, 142 N. Y. 322.)

HAIGHT, J. Prior to an amendment of 1899 the Transfer Tax Law (L. 1896, ch. 908, section 230, as amended L. 1897, ch. 284), provided that "Estates in expectancy which are contingent or defeasible shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof * * *." Under this statute it has repeatedly been held that future contingent estates were not taxable until they vested in possession and the beneficial owner could be ascertained. The question now presented is as to whether this statute has been changed. The legislature, by chapter 76 of the Laws of 1899, amended section 230 of the Tax Laws, known as chapter 908 of the Laws of 1896, by which the provision of the statute quoted is omitted and in place thereof we have the following: "Whenever a transfer of property is made, upon which there is, or in any contingency there may be, a tax imposed, such property shall be appraised at its clear market value immediately upon such transfer, or as soon thereafter as practicable." Then follow provisions particularly specifying the manner in which the value of future or limited estates shall be determined. Then it is provided that "When property is transferred in trust or otherwise, and the rights, interests or estates of the

transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith, *out of the property transferred.*"

It seems to me clear that the legislature by this amendment intended to change the law upon the subject and to make the transfer tax, upon property transferred in trust payable forthwith. The tax is not required to be paid by the conditional transferee, for, by the provisions of the statute, it is to be paid "out of the property transferred." So that whoever may ultimately take the property takes that which remains after the payment of the tax. This amendment makes provision for property transferred in trust. It, therefore, contemplates defeasible transfers as well as absolute transfers.

By the seventeenth clause of the will of the testator the residue and remainder of his estate was given in trust to his executors for the benefit of his son Alfred G. Vanderbilt, which trust is to continue until he becomes thirty years of age, at which time one-half of the trust estate is to be turned over to him, and, as to the balance, the trust is to continue until he becomes thirty-five, when the remainder is to become his absolutely. The will also contains a provision that in case he dies before becoming thirty or thirty-five the estate shall be given to other persons. The only contingency, therefore, that can happen to defeat his taking the estate in possession is his death before the period fixed for the transfer of the possession of the property to him. The estate created, therefore, is an estate in trust for the periods mentioned, with a remainder vested in Alfred G., subject to be defeated by his death before arriving at the age of thirty or thirty-five. (*Matter of Seaman*, 147 N. Y. 72; *Campbell v. Stokes*, 142 N. Y. 23; *Manice v. Manice*, 43 N. Y. 370; *Warner v. Durant*, 76 N. Y. 133; 2 Washburn on Real Property, 629.)

Under the view taken by me of this statute, the transfer

N. Y. Rep.]

Opinion per CULLEN, J.

tax still remains a tax upon succession. Each trust estate created is to be separately appraised and the tax determined according to the percentage fixed by the statute for those who are contingently entitled to the estate; and when fixed, the tax is forthwith payable out of the trust estate.

The order of the Appellate Division and that of the surrogate should be modified as indicated herein, and the proceedings remitted to assess the tax, with costs to the Comptroller.

CULLEN, J. I vote for the reversal of the order below. It is conceded that the statute on its face provides for the immediate taxation of the whole *corpus* of the trust estate, regardless of the fact that the persons who may ultimately receive either the whole or part of such *corpus* cannot now be ascertained, and for the payment of the tax out of the fund. I concede that if the statutory scheme creates a property tax it cannot be sustained. I think that such is the doctrine of the *Pell Case* (171 N. Y. 48) in which I fully concurred. But in my opinion the tax now sought to be imposed is not a property tax and the *Pell* case is not an authority for such a claim. In that case the interests of the devisees and legatees attempted to be taxed were given by the will of the testator who had died long prior to the enactment of any inheritance tax. Technically they may have been, and probably were, vested subject to be divested by death before the demise of the life tenant, but in the ordinary sense of the term they were contingent, that is to say, it was impossible to determine who would actually enjoy the property until the death of the life tenant. Nevertheless the interests of the devisee accrued on the death of the testator, and at that instant, and were immune from legislative attack whether contingent or vested. (*Brevoort v. Grace*, 53 N. Y. 245.) We, therefore, held that the legislature could not impose a tax on the transfer of property which had previously been made. This case presents a situation the reverse. True, it cannot now be told who will ultimately enjoy the *corpus* of the estate till the life tenant dies or arrives at the prescribed age. But the legis-

lature might have forbidden the suspension of the absolute ownership of the property for any period whatever as it has forbidden suspension for more than two lives in being. As said by the Supreme Court of the United States of the inheritance tax: "The right to take property by devise or descent is the creature of the law, and not a natural right — a privilege, and, therefore, the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege." (*Magoun v. Trust Co.*, 170 U. S. 283; *Matter of Dows*, 167 N. Y. 227.) Therefore, the state can say a devise or bequest may be made where the interests are contingent or the ultimate beneficiaries unknown till after some period, but in such case there shall be exacted from the beneficiaries, whoever they may prove to be, a tax to be presently taken out of the property. This, in effect, it has said, for the provision of the Transfer Tax Law under consideration was in force at the time of the testator's death. The fact that the tax is to be paid out of the property does not render it a tax on property. In both the federal and state inheritance tax laws are to be found provisions, in the case of personalty, requiring the executor to deduct the amount of the tax before turning over the legacy to the legatee, and in the case of realty making the tax a lien on the property; yet nobody has supposed that these provisions render the tax a property tax. If such was their effect, neither the federal nor state statute could be upheld. A tax is a property tax when imposed by reason of the ownership of property; a transfer tax when imposed on the method of its acquisition.

O'BRIEN, J. (dissenting). The will of Cornelius Vanderbilt, who died on the 12th day of September, 1899, was admitted to probate on the 8th day of November, 1899, and disposed of a very large estate. The appraiser appointed by the surrogate reported that the entire estate disposed of amounted to something over fifty-two million dollars. Under the statute providing for the taxation of transfers of property by will a

N. Y. Rep.]

Dissenting opinion, per O'BRIEN, J.

tax was imposed and paid of over three hundred and twenty-five thousand dollars. The state comptroller claims that the estate should pay one hundred and eighteen thousand dollars more than has been imposed by the courts below and this controversy comes here upon the appeal of that official from the decisions below declaring and adjusting the transfer tax. The controversy is, therefore, between the state, represented by its principal financial officer, on the one side and the executors and trustees under the will, and Alfred G. Vanderbilt, a son of the deceased, and the principal residuary legatee under the will, on the other.

But one question has been argued and submitted upon the appeal and but one question is involved and that is whether a tax should be assessed as of the date of the testator's death upon certain possible future interests in portions of the estate disposed of in trust, to which there is no one now absolutely entitled either in possession or expectancy. It will not be necessary here to give all the details of this trust since they have been fully stated in the learned opinion below. (68 App. Div. 27.) The legal question in the case will be sufficiently stated by reference to those future contingent interests created by the will in favor of the son Alfred G. He insists that these interests are not now taxable, and this contention, if correct, really disposes of the whole controversy. All the other questions in the case are subordinate to the question concerning these interests, and unless they are taxable none of the other interests are. The review of the case in this court may, therefore, be very properly confined to those objections which he has presented, through his counsel, to the right of the state to impose a tax upon him based upon such future interests.

The residuary estate was given by the will to the executors in trust for the use of Alfred G. He was to receive the income until he arrived at the age of thirty years, when he was to be put into full possession of one-half the fund and to receive the income of the balance until he arrived at the age of thirty-five years, when he was to be put in possession of

the balance of the fund. But in case of his death without issue before he became thirty years old, then the fund was to go to his brother upon certain other trusts and ultimately to his brother's children if any; and in case of the death of Alfred G. before he became thirty-five years old, leaving issue, then the portion of the estate that had not come to his possession was to be held upon further trusts for the benefit of the children, but if he died before that time without issue, then his brother was to take his place as the beneficiary of the fund, the *corpus* to be disposed of eventually according to further directions in the will. In other words, if Alfred G. should die before he arrived at the age of thirty he would receive no part of the residuary estate. If he died after thirty and before thirty-five he would receive only a moiety of the fund. The question is whether these future contingent interests, of which he may never come into the possession or enjoyment, are taxable as transfers to him of property by will. Whether these remainders vested upon the death of the testator, subject to being divested by the happening of any of the contingencies mentioned, is of very little consequence in the solution of the question with which we are now concerned. That question is whether a person can be taxed as upon a transfer of property to him by will before any transfer is made or consummated. In other words, can he be taxed for something that he has not yet received and may never receive? The learned counsel for the state contends that this is not only possible, but that the lawmakers intended to accomplish just that result. Before discussing these questions it will not be out of place to observe that the power of the legislature is not only subject to constitutional limitations but to restrictions growing out of the very nature of the subject with which they may attempt to deal. If, for example, it should attempt to pass a law for taxing the expectancy of a sole heir, during the lifetime of the parents, it would be difficult to suggest how such a law could be given any reasonable or practical effect, even if it could pass the ordeal of a constitutional test. Things that in their nature are impossible of accomplishment

are not simplified much by a formula of words enacted into the form of a statute.

Until quite recently the taxation of future contingent estates or remainders, such as have been created and limited by the will in question, was governed by the following statute: "Estates in expectancy which are contingent or defeasible shall be appraised at their full undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited." This court held repeatedly that under that statute the future contingent estates therein mentioned were not taxable until they vested in possession and the beneficial owner could be ascertained. (*Matter of Hoffman*, 143 N. Y. 327; *Matter of Curtis*, 142 N. Y. 219; *Matter of Davis*, 149 N. Y. 539; *Matter of Roosevelt*, 143 N. Y. 120; *Matter of Gibson*, 157 N. Y. 680; *Matter of Dows*, 167 N. Y. 227.) It was also held that the word "transfer" is used in the statute in its ordinary legal signification, namely, that the owner of a thing delivers it to another with the intent of passing the rights which he has in it to the latter. (*Matter of Gould*, 156 N. Y. 423.) That definition of a taxable transfer is just as correct now as when the above case was decided. There would be no difficulty whatever in determining the controversy but for the change in the phraseology of the statute which is found in chapter 76, Laws of 1899. The statute quoted above was then amended and a section very long and much involved substituted in its place, but no further change was made. It is this amendment upon which the state bases its contention in this case, and it is by virtue of that statute that it is claimed that Alfred G. Vanderbilt is subject to taxation upon something that he has not yet acquired and may never acquire. The material part of the amendment reads as follows: "Whenever a transfer of property is made upon which there is, or in any contingency there may be, a tax imposed,

such property shall be appraised at its clear market value immediately upon such transfer, or as soon thereafter as practicable. * * * When property is transferred in trust or otherwise, and the rights, interests or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith out of the property transferred." The question is whether this new language has effected any substantial change in the law as it existed before. It purports to operate upon property *transferred* in trust or otherwise, and the tax is payable out of the property *transferred*. In order to bring a case within the law we must find some one who has acquired a title to property from some one else. If the law is applicable to this case, we must hold that the title of the testator has passed or has been *transferred* to his son Alfred G. by the terms of the will. If there is anything settled in the law governing this class of cases it is that the will or instrument must transfer or convey some beneficial interest. Some one must actually acquire something of value, capable of appraisal and possessing at least some of the attributes of property.

The learned court below has very justly observed, in substance, that it would be a very easy and comfortable solution of the difficulties presented by this case to say that since the legislature has changed the language of the statute it must have intended to change the law to conform to the contention of the learned counsel for the state. That, however, would be taking a very superficial view of the questions, not at all creditable to the court, and moreover unjust to the parties since they are entitled to have their legal rights determined upon some reasonable principle. That the legislature intended to tax this entire estate, as it existed at the moment that the testator ceased to own it, I think there can be no reasonable

N. Y. Rep.]

Dissenting opinion, per O'BRIEN, J.

doubt. But it does not follow by any means that this purpose has been accomplished or that it was legally possible, under the circumstances, to effectuate what was attempted. There is not the slightest difficulty in understanding the language employed in this statute as imposing a tax upon the entire estate including the fund disposed of in trust with contingent remainders limited thereon. Indeed, if language is to be understood in its ordinary and natural sense, that was the plain purpose of the lawmakers and the only rational construction to be placed upon the statute. But this view is fatal to the contention of the learned counsel for the state since the tax would then be a tax upon property and open to the objection that it is imposed upon a limited and special class of persons who have acquired it potentially in a particular manner, that is to say, by way of contingent remainders in wills. This fund is already taxable as property in the hands of the trustees under the general law applicable to the taxation of all property. It is not competent for the legislature to impose a double tax upon it because it is acquired by will. The legislature may not single out a particular class of property in the hands of a few persons that is to pass to some one in the future under contingent remainders in wills and impose what is virtually a double tax on such property. That is not a legitimate exercise of the taxing power, but deprives a person of his property without due process of law and denies to him the equal protection of the laws. This principle is very clearly foreshadowed, if not actually decided, in a recent case in this court. (*Matter of Pell*, 171 N. Y. 48.) It is quite significant, too, that the case arose upon the very section of the statute now under consideration. In that case the tax was either a property tax or a tax upon transfers that had taken effect years before the law was passed and as to which it was retroactive. In either case it was held to be an unconstitutional invasion of vested rights or property interests, and, therefore, inoperative. So, in this case, the tax is either upon property or upon the transfer of a contingent future interest to some one now unknown and impossible of present identification.

The conclusion, therefore, that the tax is upon property, as such, must not only be avoided at every stage of the argument, but it must be shown that it is a tax upon a transfer to Alfred, although he has no beneficial interest and may never have. It would be mere casuistry to attempt to show that the testator transferred the *corpus* of this fund to his son when every one knows that he has no present beneficial interest in it and may never have. It is suggested that there was a transfer from the testator to the trustees and so there was, but that carried to them no beneficial interest whatever but only the naked title for the purposes of the trust. There must still be a beneficial interest in the transferee in order to constitute a taxable transfer. To impose a tax upon the fund in the hands of the trustees would deplete the trust in its very inception, and, moreover, it would be nothing else than a tax on property. No amount of argument can obscure the plain fact that to impose a succession tax of one per cent on this fund in the hands of the trustees who do not own it and have no beneficial interest would be a property tax under another name. The transfer tax is to be based upon the market value of the property transferred. It is manifest that this provision cannot possibly be applied to this case since the future contingent interests, said to be transferred by the will, cannot in the nature of things have any market value whatever. Alfred's chance of living till he becomes thirty-five cannot be the subject of valuation or taxation.

The difficulty with the statute in this case is that the framers have not kept in mind the exact nature and scope of a tax upon transfers. It is manifestly impossible to impose a transfer tax, within any fair or reasonable meaning of that term, before any transfer takes place. Hence none of the difficulties which always existed in the attempts to tax future contingent or defeasible interests have been removed by the amendment to the statute. The state claims that the statute has imposed a tax upon the remainders as of the date of the testator's death, payable out of the property disposed of by the will. That is plainly a property tax, subject to all the

N. Y. Rep.]

Dissenting opinion, per O'BRIEN, J.

objections already referred to, unless it can be shown by some fair process of reasoning or argument to be something else; that is to say, a transfer or succession tax. The first step in such an argument is to point out the person who has succeeded to the title of the testator, or, in other words, the transferee. The argument is not advanced much by the suggestion that the trustees answer to that description. If we can find no other transfer but that which vests title in trustees for the purposes of the trust, without any beneficial interest whatever, that amounts to a confession that the tax is a property tax and nothing else. When the state takes a part of the property of a deceased person in the hands of a mere custodian, having no beneficial interest in it, the argument that it is not a property tax, but a succession tax, must fail to make much impression on the mind. If it could be shown that the testator has transferred all his interest in this fund to his son, by the terms of the will, then the son would answer to the description of a transferee. It could then be said that he had received a large property from his father by will, and, as his right to receive it rested entirely upon the laws of the state, a transfer or succession tax, as distinguished from a property tax, was due and payable. But it is very obvious that the situation, as it now exists, is quite otherwise. He has no present taxable interest in the fund. Whether he will ever receive any part of it must depend upon his chances of life till he arrives at a certain age. It may be that, according to tables of mortality, he is destined to become the owner of this vast fund, but until that time arrives there is no transfer to him in any such sense as that term has been understood and applied to this method of taxation. The effect of the legislation, if it has any effect whatever, was to impose a property tax upon all property situated with respect to title and future ownership as this fund is.

There is a provision of the statute to the effect that in certain cases a tax will be imposed and in case the remainder is defeated the tax is to be returned. In one of the opinions below it was thought that this provision had some application

to this case. With all respect I am unable to see how it has. The only way it could possibly be applied is to hold that Alfred must pay the tax now, whether eventually he gets anything under the will or not, and if he dies before he becomes thirty years old then the tax must be refunded to his estate. To exact from a person a large sum of money as a condition of his right to acquire property by will, before he has acquired it, and when the conditions are such that he may never acquire it, on the promise to refund the money in case he never acquires the property, is not taxation, but something like a forced loan, the payment of which, in this case, would depend upon the chances of the remainderman to survive a certain age.

It is quite unnecessary in this case to put a strain upon language or to violate fundamental principles of taxation in order to reach the fund in question. This is not a case where any part of a vast estate is to escape taxation. Every interest in possession or enjoyment that passed under the will has already paid the succession or transfer tax. The trust fund from which the remainders in question are to be carved is subject to general taxation like all other property. When any of the contingencies have happened upon which these future interests depend, so that they can vest in possession or enjoyment, then the succession or transfer tax upon the remainders is due and payable, but not before, for the plain reason that there is no transfer consummated and the ultimate owner of the beneficial interest is not known and cannot be identified. The order appealed from should be affirmed, with costs.

PARKER, Ch. J., and WERNER, J., concur with HAIGHT and CULLEN, JJ.; GRAY and VANN, JJ., concur with O'BRIEN, J.

Ordered accordingly.

FREDERICK REICHERT, Respondent, v. CHARLOTTE M. STILWELL, as Administratrix of CHARLES A. STILWELL, Deceased, et al., Appellants.

MORTGAGE — ACTION TO FORECLOSE, AFTER FORECLOSURE OF ANOTHER MORTGAGE ON OTHER PROPERTY GIVEN IN PART AS COLLATERAL SECURITY FOR DEBT SECURED BY FIRST MORTGAGE, NOT PROHIBITED BY CODE CIV. PRO. §§ 1628, 1630. An action to foreclose two mortgages upon the same property, made by the same mortgagor and held by the same assignee, is not prohibited by sections 1628 and 1630 of the Code of Civil Procedure, notwithstanding that another mortgage given by the same mortgagor upon another property to the same mortgagee to secure the payment of another debt and also as a further and additional security for the debts represented by the first two mortgages, had been foreclosed by such mortgagee and the proceeds of the sale, after paying the expenses of foreclosing the last mortgage, and the amount for which it was given, had been applied upon the payment of the debts secured by the first two mortgages but leaving a deficiency for which no judgment was ever entered or docketed, or execution issued to collect the amount thereof, and that after such sale the mortgagee assigned the first two mortgages without in terms transferring any right to the deficiency, which, however, passed by operation of law to an assignee who thereafter, and without obtaining leave of the court, began the action to foreclose the first two mortgages: since the deficiency judgment, if one had been entered and docketed, would not have been a "final judgment for the plaintiff * * * in an action to recover any part of the mortgage debt" secured by the first two mortgages and no action has been brought to recover any part of such mortgage debt, within the meaning of the statute, for the reason that the suit to foreclose the mortgagor's equity of redemption in the property covered by the last mortgage was not such an action.

Reichert v. Stilwell, 57 App. Div. 480, affirmed.

(Argued May 13, 1902; decided October 7, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 18, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought to foreclose two mortgages upon the same parcel of land, and the defense was founded upon sections 1628 and 1630 of the Code of Civil Procedure.

The facts, so far as material, are stated in the opinion.

Louis L. Waters and *D. F. McLennan* for appellants. The Appellate Division has placed an interpretation upon sections 1628 and 1630 of the Code of Civil Procedure which limits and restricts the plain meaning of the language of the sections and which is not authorized by previous judicial interpretation of similar statutes. (*Suydam v. Bartle*, 9 Paige, 295; *E. L. Ins. Society v. Stevens*, 63 N. Y. 344; *Dunkley v. Van Buren*, 3 Johns. Ch. 330; *Jones v. Conde*, 6 Johns. Ch. 77; *McKernan v. Robinson*, 84 N. Y. 105; *Engle v. Underhill*, 3 Edw. Ch. 249; *Grosvenor v. Day*, 1 Clark Ch. 71; *McKuskie v. Henderson*, 128 N. Y. 558.) Plaintiff has admitted the error of his proceedings herein by moving for leave to prosecute this action, and for an order staying all proceedings until a deficiency judgment was filed, entered and docketed under the former judgment and the issuing and return of execution thereon wholly or partly unsatisfied. Such application has been in all things denied, which denial is *res judicata* as against plaintiff's contentions in this case. (*Culross v. Gibbons*, 130 N. Y. 447; *People ex rel. v. Council*, 140 N. Y. 306; *U. S. L. I. Co. v. Poilon*, 27 N. Y. S. R. 899.) The judgment of foreclosure in the former action set forth in the complaint and answer is a final judgment within the terms and meaning of sections 1628 and 1630 of the Code of Civil Procedure. (*Moore v. Shaw*, 15 Hun, 428; *Day v. Bergen*, 53 N. Y. 404; *Morris v. Morange*, 38 N. Y. 172; *Springsteene v. Gillett*, 30 Hun, 260.) The judgment of foreclosure in the former action included or contained a judgment for deficiency. The basis of the major part of said judgment was the same debt secured by the mortgages here sought to be foreclosed. (*Frank v. Davis*, 135 N. Y. 277; Code Civ. Pro. §§ 1627, 3339; *Hunt v. Chapman*, 51 N. Y. 557; *Dudley v. Congregation*, 138 N. Y. 451.) There was in existence, at the time when this action was brought, a final judgment for the plaintiff, rendered in an action to recover the mortgage debt secured by the mortgages here sought to be foreclosed. (Code Civ. Pro. § 1630; *Guilford*

N. Y. Rep.]

Points of counsel.

v. *Crandall*, 69 Hun, 414; *Barbig v. Kirk*, 70 N. Y. S. R. 470.) No leave of the court in which the former action was brought to commence or maintain this action has been obtained. (Code Civ. Pro. § 1628; *Schofield v. Doscher*, 72 N. Y. 491; *McKennon v. Robinson*, 84 N. Y. 105; *Earl v. David*, 20 Hun, 527; 86 N. Y. 634; *Balles v. Duff*, 10 Abb. [N. S.] 414.) Sections 1628 and 1630 of the Code of Civil Procedure do not prohibit a foreclosure of any kind, but merely prescribe rules of procedure and require certain things to be done before foreclosures for the same mortgage debt are commenced or maintained. The fact that both mortgages were given for the same debt and the former judgment based on the same indebtedness is the controlling feature, the purpose of the statute being to prevent a double action for the same debt except under the direction of the court, and to prevent a double judgment and double costs for the same debt when one judgment might have been satisfied under execution. (*E. L. I. Soc. v. Stevens*, 63 N. Y. 345; *Suydam v. Bartle*, 9 Paige Ch. 295.) The Special Term and Appellate Division erred in holding that a personal judgment for the mortgage debt was purely incidental to the purposes of the foreclosure. (*Merritt v. Bartholick*, 36 N. Y. 44.) It is equitable that two judgments shall not be rendered against appellant for what is really the same deficiency. (*Springsteene v. Gillett*, 30 Hun, 260; *Day v. Bergen*, 53 N. Y. 404; *Morris v. Morange*, 38 N. Y. 172.) No action based upon the bonds set forth in the complaint in this action can be maintained, for the reason that such bonds and the indebtedness which they represent are merged in the deficiency judgment taken under the foreclosure of the \$3,720 mortgage. (*Butler v. Miller*, 1 N. Y. 500.)

Augustus C. Stevens, Charles G. Baldwin and Charles E. Stevens for respondent. The action brought by Helen B. Sanford for the foreclosure of the mortgage covering the sale of lots was not "an action to recover any part of the mortgage debt" in this action, within the meaning of section 1630

of the Code of Civil Procedure. (*Dudley v. Congregation, etc.*, 138 N. Y. 451.) The provision in the judgment of foreclosure and sale in the salt lot mortgage action, that the defendant pay any deficiency, was not a final judgment for the plaintiff within the meaning of section 1630 of the Code. (*Nutt v. Cuming*, 155 N. Y. 309.) The mortgage debt secured by the salt lot mortgage was fully paid in the foreclosure of such mortgage. (*Howe v. Fisher*, 2 Barb. Ch. 559; *Gaylord v. Kapp*, 15 Hun, 87; *Spencer v. Spence*, 95 N. Y. 353; *Mack v. Austin*, 95 N. Y. 513; *Bache v. Dascher*, 9 J. & S. 150; *Argall v. Pitts*, 78 N. Y. 239; *Freeman v. Auld*, 44 N. Y. 50; *Bolen v. Crosby*, 49 N. Y. 183; *Cobbey on Chattel Mortgages*, 650, 651; *Landon v. Buell*, 9 Wend. 80.) Section 1628 of the Code of Civil Procedure does not require the consent of the court to commence an action to foreclose a mortgage. (*Williams v. Chaplain*, 8 Paige Ch. 70; *Thomas v. Brown*, 9 Paige Ch. 370; *E. L. Ins. Soc. v. Stevens*, 63 N. Y. 347.) The defendant Stilwell has contracted three separate and distinct debts and not one as assumed by his counsel. (*Miller v. Lockwood*, 32 N. Y. 292.) The denial of the motion made by plaintiff for an order staying proceedings in this action until a deficiency judgment was filed, entered and docketed in the former action, and an execution issued and returned unsatisfied, does not estop this plaintiff from asserting that such a motion was unnecessary. (*Lewis v. O. N. & P. Co.*, 125 N. Y. 341; *Bell v. Merrifield*, 109 N. Y. 202; *Zoeller v. Riley*, 100 N. Y. 102; *Dickinson v. Price*, 64 Hun, 149.)

VANN, J. The defendants' intestate, Charles A. Stilwell, gave two mortgages upon his farm in the town of DeWitt, county of Onondaga, one in 1881 for \$2,000 and the other in 1886 for \$1,000, to secure the payment of money borrowed at the dates and to the amounts stated. A bond in the usual form accompanied each mortgage and represented the debt secured. In 1897 he gave a mortgage upon certain salt lots owned by him in the city of Syracuse for \$3,720, of which the

sum of \$720 represented a new and independent consideration and the remainder represented the debt secured by the two mortgages upon his farm. The mortgage on the salt lots contained the condition that said sum of \$720 and interest should be paid and also that it was given "as a further and additional security for the payment" of the debts represented by the two mortgages upon the farm. In 1899 the mortgage on the salt lots was foreclosed and the proceeds, above expenses, were applied in payment of said sum of \$720, and the remainder upon the two farm mortgages. A deficiency was reported by the sheriff making the sale, but no judgment was ever entered or docketed therefor, nor was any execution issued to collect the amount thereof. Subsequently the holder of all the mortgages, including said deficiency arising in the action to foreclose, transferred the mortgages on the farm to the plaintiff without, in terms, transferring any right to the deficiency, which, however, passed by operation of law. A few days later the plaintiff began this action to foreclose the mortgages on the farm without obtaining leave of the court, and the defendants' intestate answered, asking that the complaint be dismissed because no leave had been obtained under section 1628, or execution issued pursuant to section 1630 of the Code of Civil Procedure. The defense was not sustained and judgment of foreclosure in the usual form was rendered at Special Term and affirmed on appeal by the Appellate Division, one of the justices dissenting.

Section 1628 provides that "While an action to foreclose a mortgage upon real property is pending, or after final judgment for the plaintiff therein, no other action shall be commenced or maintained, to recover any part of the mortgage debt, without leave of the court in which the former action was brought."

Section 1630 provides that "Where a final judgment for the plaintiff has been rendered, in an action to recover any part of the mortgage debt, an action shall not be commenced or maintained to foreclose the mortgage," unless an execution

has been issued upon the judgment and returned wholly or partly unsatisfied.

As we read these sections, the command of the earlier is not to sue the bond, or the promise representing the mortgage debt, while an action to foreclose the mortgage is pending, without leave of the court; and of the later, not to commence an action to foreclose, after judgment rendered in an action at law on the bond or promise, without the return of an execution unsatisfied. The object of the statute is to shield the mortgagor from the expense and annoyance of two independent actions at the same time with reference to the same debt. This is the policy of the law in statutory foreclosures and was the policy of the Revised Statutes relating to foreclosures by action, prior to the enactment of the Code. (2 R. S. 191, § 156; *id.* 544, § 1.) In other words, only one action is permitted at the same time, except as the statute provides, for it forbids a suit in equity to foreclose the mortgage until the remedy at law on the bond, if resorted to, has been exhausted, and an action at law on the bond, while a suit in equity to foreclose the mortgage is pending, without leave of the court. (Throop's Code, notes to §§ 1628 and 1630.) As was well said in the opinion of the Special Term: "It was never intended to prohibit a separate foreclosure in equity of two separate mortgages, upon separate pieces of property, although each may have been given to secure the payment of the same indebtedness." It may be added that as the actions to foreclose both mortgages must be before the same court, with all the power of a court of equity, the rights of the parties can be fully protected by imposing any condition as to costs or otherwise that justice may require.

An action to foreclose a mortgage is not an action to recover the mortgage debt from the mortgagor personally, but to collect it out of the land by enforcing the lien of the mortgage. There is only one cause of action alleged, even if the bond is set forth in the complaint and judgment for deficiency is demanded as a part of the relief. No motion to separate could be successfully made under section 483 of the Code, upon the

N. Y. Rep.]

Opinion of the Court, per VANN, J.

ground that a cause of action at law on the bond had been united with a cause of action in equity on the mortgage. An action to enforce a mortgage is not an action *in personam* to recover a debt from an individual, but is in the nature of a proceeding *in rem* to appropriate the land by foreclosing the lien of the mortgage and applying the proceeds to discharge the debt. The Revised Statutes authorize the court in an action of foreclosure to render judgment against the person liable for the mortgage debt for any deficiency that may remain after selling the land and applying the proceeds. (2 R. S. 191, § 154.) That, however, is not a distinct and independent cause of action, but is an incidental remedy, dependent wholly upon the statute and subsidiary to the main object of the action. Before the passage of the Revised Statutes the court had no power to include a provision for deficiency in a decree of foreclosure. (*Dunkley v. Van Buren*, 3 Johns. Ch. 330; *Jones v. Conde*, 6 id. 77.)

The nature of an action to foreclose a mortgage was considered by us in *Dudley v. Congregation of St. Francis* (138 N. Y. 451). In that case the mortgage was void, but the debt that it was given to secure was valid, and hence the plaintiff insisted that he should recover upon the bond, which was covered by the allegations of the complaint in the usual form. "In an action to foreclose a mortgage," as we said when discussing the subject in that case, "a judgment for deficiency is authorized and may be rendered as incidental to the principal relief demanded, but it cannot be rendered in an action where the plaintiff fails to establish the mortgage. The peculiar statutory provisions applicable to actions of foreclosure above referred to indicate that it was never intended to permit the joinder in the same complaint of two separate causes of action, one at law to recover a personal judgment on the bond for the debt, and the other in equity to procure a sale of the land covered by the mortgage, given to secure the same debt and the application of the proceeds thereon, and if not, then the complaint in this case does not contain but a

and constructed thereon a junction depot and a track system connecting the elevated road on Broadway with that on Fulton street, where previously these two railroads were about 200 feet apart, so that each passenger wishing to transfer at East New York from the elevated road on Fulton street to that on Broadway and *vice versa* had been required to descend the stairs, cross the block, ascend the stairs of the other road and pay an additional fare. After such construction passengers were allowed to transfer from one road to the other without descending to the street and without extra fare, and certain through trains were run without change of cars and without extra fare from one road to the other at East New York.

In addition to the elevated railroads on Broadway and Fulton street defendant operates a double-track street surface railroad running directly underneath these elevated roads, one from the Broadway Ferry to East New York and another from the Fulton Ferry to East New York, and thence, still continuing underneath the elevated road, easterly to Cypress Hills. After the construction of the union depot at East New York, surface railroad track connections were also made similar to those of the elevated roads, whereby the surface cars of defendant ran upon the grounds of the union depot and passengers were given free transfer from the elevated roads to the surface roads and *vice versa* through the union depot in all directions.

Among the other changes in the service made by defendant was the substitution of a belt line elevated service during certain hours between the bridge and East New York, the operation of which, defendant claims, necessarily prevented the company from operating all of the trains on the Lexington avenue route between the bridge and East New York as through trains, or on the Broadway road between Broadway Ferry and Cypress Hills, so that a person taking a belt line train was compelled to change cars at East New York to the elevated or surface lines for the purpose of continuing easterly toward Cypress Hills. During the hours when the belt line

service was in operation the system was a single car service on a twenty minutes headway on the elevated road between Cypress Hills and the union station and increased service on the surface lines between the same points, to which transfers were made without extra charge; but during "rush hours" — from 5 to 10 A. M. and 4 to 8 P. M. — the belt line service was not employed, and defendant ran through elevated trains to Cypress Hills, as before, except on holidays, when there were no through trains, and on Sundays, when there were none except in the summer, and then but a few hours.

Relator complained of defendant's refusal to run through trains to Cypress Hills during all hours as theretofore, and petitioned the court for a writ of mandamus. An alternative writ was issued, came on for trial and resulted in a submission to the jury of a single question, "Does public necessity or convenience require that the defendant operate its elevated road system from and between the termini at the Brooklyn Bridge and Broadway Ferry and the terminus at Cypress Hills in the manner the same was operated prior to the first day of April, 1900?"

The jury answered the question in the affirmative and a writ of mandamus was issued by the Special Term in which this finding was incorporated, and defendant commanded to operate its system as it did prior to April 1, 1900.

The Appellate Division reversed the order of the Special Term and the plaintiff appeals to this court.

Stephen C. Baldwin and *Benjamin N. Cardozo* for appellant. The court has jurisdiction to review the order; and if in any view, either of the pleadings or of the proof, the relator was or might be entitled, either on this trial or a new trial, to some form of relief, whether as complete as that granted by the Special Term, or less complete, the action of the Appellate Division in reversing the order of the Special Term and dismissing the proceedings is not to be sustained. (*People ex rel. v. Board of Taxes*, 166 N. Y. 154; *People ex rel. v. Jeroloman*, 139 N. Y. 14; *People ex rel. v. Van*

Wyck, 157 N. Y. 495; *People ex rel. v. Board of Education*, 158 N. Y. 125; *People ex rel. v. Moss*, 161 N. Y. 623; *People ex rel. v. Coler*, 168 N. Y. 6; *People ex rel. v. Clausen*, 163 N. Y. 523; *People ex rel. v. Bd. of Suprs.*, 135 N. Y. 522; *New v. Vil. of New Rochelle*, 158 N. Y. 41; *Benedict v. Arnoux*, 154 N. Y. 715.) The writ of mandamus will issue to compel an elevated railroad company to operate its road. (*People v. N. Y. C. & H. R. R. Co.*, 28 Hun, 543; *People v. A. R. R. Co.*, 24 N. Y. 261; *Matter of Loder*, 14 Misc. Rep. 208; *State ex rel. v. B. T. Co.*, 62 N. J. L. 592; *U. P. R. R. Co. v. Hall*, 91 U. S. 343; *State v. H. R. R. Co.*, 29 Conn. 538; *R. R. Com. v. R. R. Co.*, 63 Me. 269; *Atty-Gen. v. Boston*, 123 Mass. 475; *People v. R., W. & O. R. R. Co.*, 103 N. Y. 95; *S. P. Assn. v. Mayor, etc.*, 152 N. Y. 257, 265; *Potwin v. T. R. Co.*, 51 Kan. 609.) The duty to operate its road is a clear and specific legal duty, imposed upon the railroad company by the statutes of this State. (L. 1892, chs. 306, 460, 534, 676, 700, 702; *People v. R., W. & O. R. R. Co.*, 103 N. Y. 95.) The withdrawal of service by the respondent amounted as matter of law to an abandonment of a portion of its line. While a certain discretion is lodged with the directors to determine how often trains shall be run, the discretion is not unlimited, and when it is so exercised as to cause a virtual abandonment of part of the line, the court may compel the corporation to perform its duty. (*State v. H. & N. H. R. R. Co.*, 29 Conn. 538; *People v. N. Y. C. & H. R. R. Co.*, 28 Hun, 547.)

Charles A. Collin and William F. Sheehan for respondent. The pleadings, evidence and verdict, construed most favorably to the relator, do not show any act or omission of the defendant in violation of a specific duty plainly imposed by law. The order of the Appellate Division reversing the final order of the Special Term and dismissing the proceeding, was, therefore, proper. (*People v. N. Y., L. E. & W. R. R. Co.*, 104 N. Y. 58; *People ex rel. v. N. Y. C. & H. R. R. Co.*, 31 App. Div. 335; *People ex rel. v. Railroad Comrs.*, 158 N.

N. Y. Rep.] Opinion of the Court, per PARKER, Ch. J.

Y. 421; *People ex rel. v. Railroad Comrs.*, 160 N. Y. 202; 40 App. Div. 559; *O., etc., R. R. Co. v. People*, 120 Ill. 200; *N. P. R. R. Co. v. W. T. R. Co.*, 142 U. S. 492; *Comm. v. F. R. R. Co.*, 12 Gray, 180; *People v. R., W. & O. R. R. Co.*, 103 N. Y. 95.)

PARKER, Ch. J. We agree with the Appellate Division that the court had no power to grant a mandamus in this proceeding.

The Railroad Law (L. 1890, ch. 565) confers upon the board of directors of every railroad corporation the power "To regulate the time and manner in which passengers and property shall be transported, and the compensation to be paid therefor" (§ 4, subd. 8), and further provides that "Every railroad corporation shall start and run its cars for the transportation of passengers and property at regular times, to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of all passengers and property which shall be offered for transportation at the place of starting, within a reasonable time previously thereto, and at the junctions of other railroads, and at the usual stopping places established for receiving and discharging way passengers and freight for that train; and shall take, transport and discharge such passengers and property at, from and to, such places, on the due payment of the fare or freight legally authorized therefor." (§ 34.)

Notwithstanding these provisions, according to the view adopted by the trial court, the discretion especially committed to the judgment of the board of directors of a railroad corporation may upon the application of persons claiming to be aggrieved be subjected to review by court and jury and their determination in the premises substituted for that of the directors.

The Supreme Court of the United States and this court have decided, however, that a writ of mandamus to compel a railroad to do a particular act can be issued only when by statute there is a specific legal duty on its part to do that act, and clear proof of a breach of the duty. (*Northern Pacific*

R. R. Co. v. Dustin, 142 U. S. 492; *People v. N. Y., L. E. & W. R. R. Co.*, 104 N. Y. 58.)

In the latter case the defendant refused to build at the village of Hamburg on its line a building of sufficient capacity to accommodate its passengers. The village invoked the aid of the railroad commissioners of this state who, after an examination of the matter, determined that such a station as was asked for should be built, and reported their determination to the Attorney-General, who instituted an action in behalf of the People to compel its construction by the defendant. The mandamus was granted at Special Term and affirmed at General Term (40 Hun, 570), but in this court it was held that mandamus would not lie inasmuch as the duty to erect the station was not plainly imposed by statute. In the course of the opinion Judge DANFORTH said: "As the duty sought to be imposed upon the defendant is not a specific duty prescribed by statute, either in terms or by reasonable construction, the court cannot, no matter how apparent the necessity, enforce its performance by mandamus. It cannot compel the erection of a station house, nor the enlargement of one. The power of the company to provide such buildings is, under the statutes, a permissive one only. If the corporation chooses to exercise it it may. The statute does not exact it. * * * As to that the statute imposes an authority only, not a command, to be availed of at the option of the company in the discretion of its directors, who are empowered by statute to manage 'its affairs,' among which must be classed the expenditure of money for station buildings or other structures for the promotion of the convenience of the public, having regard also to its own interest. With the exercise of that discretion the legislature only can interfere."

This case was cited with approval by the Supreme Court of the United States in the *Dustin Case* (*supra*).

We agree, therefore, with the conclusion of the Appellate Division that mandamus will not lie in this case to compel defendant to operate its road in the same manner as it operated it prior to April 1, 1900, because the statute enjoins no such

N. Y. Rep.] Opinion of the Court, per PARKER, Ch. J.

duty upon it, but instead submits the responsibility of determining how many trains shall be run and at what intervals of time to its board of directors.

In the event of an abuse of the discretion committed to a board of directors the legislature has, however, provided a remedy. The legislature authorized the creation of railroad corporations in the first instance, and conferred upon them broad powers, the exercise of which it could subsequently regulate, within reasonable limits. When the teachings of experience made it clear that occasionally the directors of railroads do not sufficiently recognize and provide for the convenience and necessities of the public, the legislature, by chapter 353 of the Laws of 1882, created a board of railroad commissioners and conferred upon them the power, upon due notice to the railroad, and after a hearing, to determine whether "repairs are necessary upon any railroad within this state, or that any addition to the rolling stock, or any addition to or change of the stations or station houses, or that additional terminal facilities shall be afforded, or that any change in the rates or fare for transporting freight or passengers, or that any change in the mode of operating the road and conducting its business is reasonable and expedient in order to promote the security, convenience and accommodation of the public. * * *."

It was under this act that the railroad commissioners, in *People v. N. Y., L. E. & W. R. R. Co. (supra)*, took action looking to the building of a railroad station at Hamburg. The commissioners decided the station should be built, but were without power to enforce their decision, and the statute conferred no authority on the courts to enforce it. When the controversy came before this court it pointedly called attention to the fact that the statute had clothed the commissioners with judicial powers to hear and determine such questions, but that the law failed in effectiveness because of its omission to furnish a remedy. The court said: "The railroad commissioners are powerless, and as the law now stands neither the attorney-general of the state nor its courts can make their order effectual."

Subsequently the railroad commissioners, in their report to the legislature, referred to this decision, repeating its recommendations of amendments authorizing mandamus to enforce decisions of the board. (1888, Vol. I, 22, 23.) The result was that, in the revision of the Railroad Law, the commissioners of statutory revision incorporated in their report to the legislature of 1890 a new provision which, with slight amendment, is now contained in sections 161 and 162 of the Railroad Law. In that report attention was expressly called to the fact that the provision authorizing mandamus, in certain cases, to enforce the recommendations of the board was new.

The present state of the law, therefore, is, that in a number of matters which in the first instance are committed to the discretion of the directors there may be upon notice and after hearing a determination by the railroad commissioners differing in part or *in toto* from the action of the directors, and which supersedes it; and included within such law is the right to determine whether "the mode of operating the road and conducting its business is reasonable and expedient in order to promote the security, convenience and accommodation of the public." And the determination thus made may be enforced in the courts by mandamus. This judicial determination of the commissioners, whether favorable to complainant or railroad, may be reviewed by the court by certiorari, on which review the Appellate Division has the power, and upon it rests the duty, of examining the facts. (*People ex rel. Loughran v. Railroad Commissioners*, 158 N. Y. 421; *People ex rel. Steward v. Railroad Commissioners*, 160 N. Y. 202.)

Hence, the legislature—in which is vested the power to regulate and control within reasonable limits the affairs of the corporations brought into existence by its permission—has provided a method by which certain matters committed to the discretion of the directors of railroads in the first instance may—in case of seeming abuse of such discretion—be examined by a board of state officers, who are in receipt of regular financial reports from all railroad companies, have power to

N. Y. Rep.]

Statement of case.

make personal investigation of corporation books and opportunity for personal inspection, observation and examination, and can bring to their aid experts in every department of railroad construction or operation. Such officers necessarily become specially skilled in passing upon such questions, but before they can make any determination there must be a hearing upon notice with opportunity for both the aggrieved party and the railroad to present evidence, after which their determination may be made; but whether it be made in favor of one party or the other, it is open to review by the courts upon application of either party.

It is apparent, therefore, that the relator mistook his remedy, if he has a substantial grievance, for it should have been presented to the railroad commissioners, who have been given by the legislature an authority which the court does not possess of making a determination in relation to grievances which parties think they have by reason of the manner in which the directors have disposed of the questions, among others, of construction and operation, conferred upon them by the legislature, and later made subject to such changes as might be directed by the railroad commissioners after hearing had, which may in turn be reviewed by the court, as we have pointed out.

The order should be affirmed, with costs.

GRAY, O'BRIEN, HAIGHT, VANN, CULLEN and WERNER, JJ.,
concur.

Order affirmed.

GODWIN S. COLLIER, Respondent, v. HENRY S. COLLINS,
Appellant.

APPEAL—FROM JUDGMENT, ONLY, AFTER DENIAL OF MOTION FOR NEW TRIAL—APPELLATE DIVISION HAS NO POWER TO REVIEW OR REVERSE UPON THE FACTS. Where, in the trial of an action before a jury, after the granting of a motion dismissing the complaint at the close of plaintiff's case, to which no exception was taken, a motion for a new trial, made without specifying any grounds, was denied, but no order was entered and no foundation laid for an appeal therefrom, the Appellate

Division, upon an appeal from the judgment dismissing the complaint, has no power to review or reverse upon the facts, and where there are no exceptions taken to rulings relating to the admission or exclusion of evidence that would authorize the reversal of the judgment of the trial court, the Court of Appeals must reverse the order of the Appellate Division and affirm the judgment of the trial court.

Collier v. Collins, 58 App. Div. 550, reversed.

(Argued June 20, 1902; decided October 7, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered March 8, 1901, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and granting a new trial.

This action was brought to recover damages on account of personal injuries alleged to have been sustained by the plaintiff through the negligence of the defendant. She rented the ground floor of a tenement house from him, and was authorized by his agent to use a window, which had an iron gate swinging on hinges, in order to reach the back yard. An area in the yard, directly beneath the window and two feet lower, opened into the cellar, which had another entrance for the use of tenants generally. At the surface of the ground the area was twenty-two by thirty-two inches in size and was covered by wooden slats fastened together, making a cover twenty-four by thirty-two inches, but without anything to prevent it from slipping into the hole if it became slightly displaced. It had no support on the side next to the house, and when exactly in position the margin of support by the ground was but two inches. On one occasion, not long before the accident, the plaintiff asked the defendant's agent to fix it and he said that he had, and thereupon jumped upon it declaring it was all right. It does not appear what he did to repair it, but its dimensions were not enlarged nor further support furnished. November 7th, 1898, at about half-past ten in the evening, the plaintiff went out into the yard through the window to hang up clothes, as was her custom, and on returning, the cover over the area as she stepped

upon it tilted into the hole, and she was injured more or less severely. The trial court dismissed the complaint, but the Appellate Division reversed the judgment entered accordingly, two of the justices dissenting.

J. Stewart Ross for appellant.

John J. Leary for respondent.

VANN, J. At the close of the evidence for the plaintiff the defendant moved to dismiss the complaint upon the ground that no cause of action had been established against him. The motion was granted, but the plaintiff took no exception, and thus apparently acquiesced in that disposition of the case. (*Hecla Powder Co. v. Sigua Iron Co.*, 157 N. Y. 437, 441.) Her motion for a new trial, made without specifying any ground therefor so far as appears, was denied and she excepted, but no order was entered and no foundation laid for an appeal therefrom. Her appeal to the Appellate Division was from the judgment only. She made no attempt to appeal from an order, whether entered or not, denying her motion for a new trial. Her notice of appeal is silent upon the subject, as she asked a review of nothing but the judgment.

While a different rule prevails in actions tried by the court without a jury, or by a referee, when the trial is before a jury an appeal from the judgment brings up for review by the Appellate Division questions of law only arising upon exceptions taken during the trial. (*Thurber v. Harlem Bridge, M & F. R. R. Co.*, 60 N. Y. 326, 328; *Boos v. World Mutual Life Insurance Co.*, 64 N. Y. 236, 242; Baylies on Appeals, 308.) Such an appeal does not permit that court to pass upon the weight of evidence, and is in effect a waiver of any further review of the questions of fact. While Appellate Divisions have a wide latitude, which we should be glad to have them exercise more freely, in reversing upon the facts, they have no power to do so, in an action tried before a jury, unless an order is entered denying a motion for a new

trial made upon the proper ground and an appeal is taken from the order. No exception lies to the action of the court in denying such a motion, but an order must be entered and an appeal taken therefrom, or the Appellate Division has no power to review or reverse upon the facts. (Code Civ. Proc. §§ 999, 1347.)

The only questions properly before the court below were those raised by exceptions taken to rulings relating to the admission or exclusion of evidence. The counsel for the plaintiff has argued no exception of this character, and we are unable to find one that would authorize a reversal of the judgment rendered by the trial court. Certain evidence, at first excluded subject to exception, was finally received and the error thus corrected. No other exception raises a debatable question, and hence we are compelled to reverse the order of the Appellate Division and to affirm the judgment of the trial court, with costs.

PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, MARTIN and CULLEN, JJ., concur.

Ordered accordingly.

NATIONAL REVERE BANK OF BOSTON, Respondent, v. THE
NATIONAL BANK OF THE REPUBLIC OF NEW YORK,
Appellant.

1. APPEAL — UNANIMOUS AFFIRMANCE — DISPUTED FACTS. Upon unanimous affirmance below of the judgment recovered by a party, the disputed facts will be deemed to be settled in his favor.

2. DIRECTION OF VERDICT — INSTRUCTIONS — The denial of motions made by counsel on both sides for the direction of a verdict and the submission of the case to the jury cannot be held to have prejudiced either party provided the jury decided the case as the court ought to have decided it, nor in such case is the conduct of the court in charging or refusing to charge the jury material.

3. EVIDENCE — PRESUMPTION OF OWNERSHIP. Possession by a bank of drafts which it claims to own and forwards to a correspondent for collection gives rise to the presumption that such bank owns the drafts and entitles the bank to be treated in law as the owner in the absence of any distinct proof that it was not the owner of the paper.

4. **BANKING—COLLECTION.** In the absence of proof that paper forwarded by one bank to another was sent and received for some other purpose than its collection, the employment to collect, although not expressed in words, will be presumed from the fact that the bank receiving the paper had a correspondent at the place of payment, while the bank sending the paper did not, where the previous course of business between the two banks tends to confirm the inference.

5. **SAME.** That one bank transmitted drafts to another in the usual course of business, and that the latter mailed it to a correspondent at the place where it was payable, imports, in the absence of any special agreement, an undertaking to perform the ordinary duty of collecting the paper and accounting for the proceeds, if paid, and if not paid to return the drafts unimpaired as to the liability of all the parties.

6. **AGENCY.** A bank which is the collecting agent of another does not cease to be such because it is the drawee upon which the drafts forwarded to it for collection are drawn.

7. **EVIDENCE—PRESUMPTION OF SOLVENCY.** In an action to recover damages for the failure of a bank to collect drafts or to take steps to charge the indorser thereon, it will be presumed, in the absence of proof to the contrary, that the indorser was solvent.

8. **APPEAL—OBJECTION URGED FOR FIRST TIME.** A defense in an action against a bank which failed to collect or to charge the indorser upon paper sent to it for collection that the paper may not have been actually indorsed or that the indorsement may have been without recourse or with waiver of protest cannot be urged for the first time on appeal.

9. **BANKING—DUTY AS TO COLLECTIONS.** It is the duty of a bank with which paper is left for collection to send it forward, make proper demand of payment and receive and account for the money or take the proper steps to charge the indorser.

Nat. Revere Bank v. Nat. Bank of Republic, 54 App. Div. 342, affirmed.

(Argued June 16, 1902; decided October 7, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 17, 1900, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

George S. Hastings for appellant. It was not negligence for the defendant to mail for payment the checks received from the plaintiff directly to the drawee bank. By mailing

them directly to the bank upon which they were drawn upon the day they were received the defendant discharged its full duty to the plaintiff, adopted a convenient method of presenting such checks for payment and pursued the ordinary and reasonable methods of securing payment. (*Shipsey v. B. Nat. Bank*, 59 N. Y. 491; *Morse on Banks & Banking* [3d ed.], 427; *Heywood v. Pinckney*, L. R. [9 Q. B.] 428; *Prideaux v. Cord & Co.*, L. R. [4 Q. B.] 461; *Hare v. Henley*, 10 C. B. [N. S.] 485; *Indig v. N. C. Bank*, 80 N. Y. 105.) The defendant is entitled to any doubt disclosed by the record. (*Graham v. Machado*, 6 Duer, 514; *Myers v. Machado*, 6 Abb. Pr. 198; *Stephen on Pleadings* [5th ed.], 414-427; *Vanderslice v. Newton*, 4 N. Y. 130.)

George A. Strong for respondent. Defendant was liable to plaintiff for the loss of the indorser on the two checks. This loss was caused by its negligence. Upon the evidence a verdict should upon that ground have been directed in plaintiff's favor. (*Potter v. M. Bank*, 28 N. Y. 641; *Carroll v. Sweet*, 128 N. Y. 19, 22; *Indig v. Nat. City Bank*, 80 N. Y. 100; *Martin v. Home Bank*, 160 N. Y. 190; *Kirkham v. Bank of America*, 165 N. Y. 132.) Upon the question of actual subsequent payment of the checks there was nothing for the jury, and a verdict should have been directed for plaintiff on this ground. (*Ayrault v. Pacific Bank*, 47 N. Y. 570; *Naser v. F. Nat. Bank*, 116 N. Y. 492; *S. N. Bank v. S. N. Bank*, 128 N. Y. 26; *M. Nat. Bank v. Goodman*, 109 Penn. St. 422; *D. Nat. Bank v. Anglo-Amer. Co.*, 117 Ill. 100; *Briggs v. C. Nat. Bank*, 89 N. Y. 182; *Pratt v. Foote*, 9 N. Y. 463; 10 N. Y. 599; *Com. Bank v. Union Bank*, 11 N. Y. 203; *Van Allen v. Am. Nat. Bank*, 52 N. Y. 1.)

O'BRIEN, J. The judgment recovered by the plaintiff at the trial has been unanimously affirmed below and hence the facts, so far as they were in dispute, must in this court be deemed to be settled in its favor. At the close of the trial both sides moved for the direction of a verdict in its favor

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

but the trial judge refused both requests and of his own motion submitted the case to the jury and a verdict was found for the plaintiff. In moving for the direction of a verdict at the close of the case counsel on both sides contended that there was no question of fact for the jury. The case has been argued in this court on both sides upon the theory that there was no dispute about the facts. Counsel differ, however, very widely with respect to the legal effect of the facts, each side claiming that upon the undisputed facts the judgment should have been in his favor. The submission of the case to the jury cannot be held to have prejudiced the parties or either of them provided the jury decided the case as the court ought to have decided it.

Although both sides asked the court to decide the case as matter of law the record contains numerous requests in behalf of the defendant to the court to charge the jury on certain propositions which are stated, which requests were refused and exceptions taken. These exceptions can be of very little consequence in the case unless there was some material question of fact involved in the controversy. If the case turned upon questions of law arising upon undisputed facts as counsel on both sides insisted at the close of the case, and still insist, what the learned trial judge said to the jury, or omitted to say, is not material if the case was correctly decided by the jury.

On the 29th of August, 1895, the defendant received by mail from the plaintiff a sight draft or check drawn by one Watson two days before upon the Kearney National Bank of Kearney, Nebraska, payable to the order of and indorsed by one Lydia A. Scott for \$3,500. On the next day it received in the same way another draft or check drawn two days before by the same party upon the same bank to the order of and indorsed by the same payee for \$2,500. This paper was sent to the defendant as is claimed for collection and was mailed by the defendant on the day of its receipt to the Nebraska bank upon which it was drawn. Nothing was heard from it until September 13, 1895, when the defendant received two

drafts for the same drawn upon itself by the Nebraska bank. The defendant protested these two drafts on the ground that it had no funds of the drawer to pay them and then forwarded the protested drafts to the plaintiff in discharge of whatever duties it assumed concerning the collection of the drafts originally delivered to it, but the plaintiff refused to receive them and returned them to the defendant. In the meantime the Nebraska bank had failed and suspended payment of all its obligations, including of course the two drafts upon the defendant, and being insolvent passed into the hands of a receiver. The two Watson drafts sent to the defendant by the plaintiff for collection were never returned and were never protested, so that it is claimed that the payee and indorser was discharged. The plaintiff's cause of action, therefore, rests upon the claim that the defendant never collected the paper sent to it for collection and never returned it or fixed the liability of the indorser by protest. The questions in this case are to be determined largely, if not entirely, upon legal presumptions. In the various and complicated transactions of banks in dealing with commercial paper with each other or with individuals certain acts or things which may transpire have a certain legal significance which courts are bound to declare in the absence of proof that such acts indicate something else. The defense to this action consisted principally in an attempt to show that certain facts are to be given only a limited effect or a peculiar and exceptional character without any proof to show that such was the agreement or intention of the parties, or that they are to be held to mean something different from their ordinary legal import. For instance, it is asserted without any distinct proof that the plaintiff was not the owner of the paper, but it alleged that it was and having the possession of it transmitted it to the defendant as it claims for collection. These facts entitle the plaintiff to be treated in law as the owner. So, also, it is asserted that the defendant was not the plaintiff's collecting agent, but assumed only a limited and special duty, namely, to send the paper to the bank which was the drawee for the

purpose of presentation, all of which the plaintiff could have done itself just as well. But the plaintiff had no correspondent at the place of payment and the defendant had, and hence the act of sending the paper by mail to the defendant, when taken in connection with the previous course of business between the two banks, imports an employment of the defendant by the plaintiff to collect the paper, and should be so understood in the absence of proof that the paper was sent and received for some other purpose. The employment to collect, while not expressed in words, is a legal inference from the previous relations of the parties and the nature of the business. It was open to the defendant to show that the relations of the parties were in fact otherwise, but until such proof was given the transaction must be given its ordinary legal effect.

In this state a bank receiving commercial paper for collection is, in the absence of some special agreement, liable for a loss occasioned by a default of its correspondents or other agents selected by it to make the collection. Where a sub-agent collects but fails to pay over and becomes insolvent, such insolvency will not shield the collecting agent from liability for the loss. (*St. Nicholas Bank v. State Nat. Bank*, 128 N. Y. 26; *Briggs v. Central Nat. Bank*, 89 N. Y. 182.) The collecting bank is liable for any neglect of duty occurring in the process of collection, in consequence of which any of the parties to the paper are discharged. (*Ayrault v. Pacific Bank*, 47 N. Y. 570.) If the facts of this case bring the defendant within the scope of these decisions it became liable to the plaintiff, and the judgment must be upheld. The principal defense developed by the learned counsel for the defendant in his argument in this court is that the defendant was not an agent to collect, but merely to forward the drafts to the Nebraska bank upon which they were drawn, and that having promptly done that it is not liable for any loss that the plaintiff may have sustained. The answer does aver as matter of fact that it was not such collecting agent, but there was no proof of any special agreement to take the transaction out of the general

rule. When it was shown that the plaintiff transmitted the paper to the defendant in the usual course of business and that the latter mailed it to the bank where it was payable these facts *prima facie* import an undertaking on the part of the defendant to perform the ordinary duty of collecting the drafts and accounting to the plaintiff for the proceeds if they were paid and if not paid the return of the draft unimpaired as to the liability of all the parties. If there was any special agreement express or implied which relieved the defendant from any of these duties which grew out of the nature of the transaction it assumed the burden of proof in that respect, and as already stated it gave no proof of any such fact. The legal character of the transaction, in the absence of such proof, must, therefore, be held to be the ordinary case of one bank undertaking to collect paper sent to it by another bank. The complaint distinctly alleges that such was the transaction and such the purpose for which the defendant received the paper, and the learned counsel for the plaintiff contends that there is no distinct denial of this allegation in the answer. The answer is not very distinct on that point when read as a whole, but no such objection was made at the trial and we should now assume that the answer in that respect was sufficient, but there was no proof to show that the transaction was other than the ordinary one or that there was any special agreement limiting or reducing the defendant's liability to that of a mere forwarding agent.

But the learned counsel for the defendant further contends as matter of law that since the defendant sent the drafts to the bank where they were payable and upon which they were drawn, the drawee did not become the agent of the defendant. It is said that the case of *Indig v. National City Bank* (80 N. Y. 100) sustains this proposition, but it does not seem to us that it does. With respect to that case generally it may be said, as it has been said before by this court in the *St. Nicholas Bank Case* (*supra*), that it was a border case the doctrine of which was not to be extended, and, indeed, it has been already explained and limited in *Briggs v. Central Nat. Bank* (89 N.

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

Y. 182). But no one will claim that it is not competent for the collecting bank to make the drawee bank in such a case its agent in the same way as if the paper was payable at some other place. If it had been shown in that case, as it was in this, that for several years before the transaction the drawee bank had been the collecting agent of the bank transmitting the paper, doubtless it would have been held that the relation of agency existed between the two banks. The court was careful in that case to emphasize the fact that there was no indorser on the paper, and that all that was to be done was to demand payment. In the case at bar there was an indorser who has been discharged, and the consequence is that *prima facie* the plaintiff has been damaged in a sum equal to the face of the paper (*Potter v. Merchants' Bank*, 28 N. Y. 641), so that the distinction between that case and this is to be found in the wide difference in the facts. Moreover, the *Indig* case does not really decide any such proposition as is claimed. It will be seen from the report that three members of the court concurred in the proposition now asserted. Three other members dissented entirely and the chief judge concurred with the three first mentioned on the question of damages and this resulted in the reversal of the judgment below. Hence it is very obvious that the only question decided in that case was the point presented in the opinion relating to the question of damages.

The drafts in question do not seem to have been produced at the trial, but since they had been delivered to the defendant it was bound to produce them if either their form or contents was material or to account for their absence in some way. It is suggested that the payee may have been insolvent or may not have actually indorsed the paper or if she did it, may have been without recourse or with waiver of protest. It was open to the defendant under the answer to show that the payee and indorser was insolvent and that the plaintiff was, therefore, not damaged by the failure to protest the paper. That was matter of defense, but no proof was given upon that point and in the absence of such proof the presumption is that

the indorser was solvent. The admissions in the pleadings and the general course of the trial have settled for this court the other hypothetical defenses referred to. No such suggestions were made at the trial nor was any point raised that the evidence was in these respects defective. After judgment this court must presume that the paper was regularly indorsed by the payee without any special restriction. The defendant cannot urge such defenses now after remaining silent at the trial. When commercial paper is sent forward by a bank to the place of payment the presumption is that it is in such condition as to authorize a demand of payment and the surrender of the same to the proper party upon payment being made. The legal effect of the plaintiff's proof was to cast upon the defendant the duty of sending forward the drafts for collection, to make proper demand of payment, to receive an account for the money received in payment, and to take the proper steps to charge the indorser if the paper was honored, and since the defendant failed to account for proceeds or to return the paper it was liable to the owner.

This view of the case would entitle the plaintiff to affirmance of the judgment, but there is another view which tends to strengthen this position. Of course, if the drafts had funds in the hands of the drawee, the Nebraska bank, and if the paper was paid at that bank, which was the subject of the defendant's plea, the latter would be liable to the plaintiff notwithstanding the failure of its western correspondent. We have the two facts that the latter never protested the paper, but, before it closed its doors, transmitted its own check upon the defendant in payment of the paper sent for collection. It is a reasonable presumption under such circumstances that the paper was honored and paid. So if the drawee bank in Nebraska had sufficient funds to enable the defendant to pay the two drafts which it drew, the regular course of business in order to avoid collection, then the defendant should have paid the drafts instead of protesting them. The plaintiff is entitled to judgment in discharge of its duty.

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New York, 58 A pp. Div.

the indorser was solvent. The admissions in the pleadings and the general course of the trial have settled for this court the other hypothetical defenses referred to. No such suggestions were made at the trial nor was any point raised that the evidence was in these respects defective. After judgment this court must presume that the paper was regularly indorsed by the payee without any special restriction. The defendant cannot urge such defenses now after remaining silent at the trial. When commercial paper is sent forward by a bank to the place of payment the presumption is that it is in such condition as to authorize a demand of payment and the surrender of the same to the proper party upon payment being made. The legal effect of the plaintiff's proof was to cast upon the defendant the duty of sending forward the drafts for collection, to make proper demand of payment, to receive and account for the money received in payment, and to take proper steps to charge the indorser if the paper was not honored, and since the defendant failed to account for the proceeds or to return the paper it was liable to the owner.

This view of the case would entitle the plaintiff to an affirmance of the judgment, but there is another view that tends to strengthen this position. Of course, if the drawer had funds in the hands of the drawee, the Nebraska bank, or if the paper was paid at that bank, which was the sub-agent of the defendant, the latter would be liable to the plaintiff, notwithstanding the failure of its western correspondent. We have the two facts that the latter never protested the paper, but, before it closed its doors, transmitted its own drafts upon the defendant in payment of the paper sent for collection. It is a reasonable presumption under such circumstances that the paper was honored and paid. So, also, if the drawee bank in Nebraska had sufficient funds with the defendant to pay the two drafts which it drew upon it in the regular course of business in order to account for the collection, then the defendant should have honored the drafts instead of protesting them and transmitting them to the plaintiff in discharge of the obligation which it assumed when

it undertook the collection of the original paper. It was shown that some six weeks before the drafts were drawn upon the defendant by its sub-agent, the Nebraska bank, the latter had on deposit with the defendant at least \$40,000, and there was no proof given to show what had become of it. We do not mean to say that this was even *prima facie* proof that the defendant had funds to honor the drafts drawn upon it by its western correspondent when they were received although it did honor all such drafts up to the day before, but the whole transaction shows or tends to show that the paper transmitted by the defendant to the Nebraska bank was paid in some way, and that the latter, supposing it had funds with the defendant sufficient for that purpose drew upon it in order to account for the money represented by the paper sent to it for collection. While these facts of themselves might not constitute, as matter of law, a ground of legal liability, they tend strongly to support the legal inferences as to the nature of the transaction as creating an obligation to collect the paper and the defendant's failure to discharge that obligation. In whatever way the transaction is viewed it is impossible to avoid the conclusion that the delivery of the paper by the plaintiff to the defendant for collection imposed upon the latter obligations and duties that it has failed to discharge. It neither collected the paper nor procured it to be protested in order to save the liability of the indorser.

The exceptions taken at the trial and to the charge presented by the record involve no question of law pertinent to the controversy, and the judgment should, therefore, be affirmed, with costs.

PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN and CULLEN, JJ., concur.

Judgment affirmed.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. LOUISE NORTH, Appellant, v. JAMES D. FEATHERSTONHAUGH et al., Constituting the Public Improvement Commission of the City of Cohoes et al., Respondents.

1. CERTIORARI—PUBLIC IMPROVEMENTS COMMISSION. The proceedings of a public improvement commission in awarding a contract for curbing and paving are neither judicial nor quasi judicial, and hence not subject to review by certiorari before the assessment of a tax.

2. APPEAL—QUESTION OF LAW. *It seems*, that the determination upon evidence of a public improvement commission, authorized to construct curbing wherever it deems the same necessary and whenever in its judgment the public convenience requires it, that water often permeated between the layers of blue stone causing the stones to crack when a frost occurred, to replace an existing curb of blue stone with one of granite, gives rise to no question of law reviewable by the Court of Appeals on appeal from an order confirming the proceedings of the commission, on their review under a writ of certiorari.

3. PUBLIC IMPROVEMENTS—SPECIFICATIONS—GUARANTY OF PAYMENT. *It seems*, that a provision in the specifications of the work to be done for paving a street, that the contractor will keep it in repair without expense to the city, for a period of eight years, does not place the cost of repairing upon adjacent property owners, but is a guaranty as to the quality and character of the pavement.

4. CONTRACTS—LABOR LAW. *It seems*, that a contract for curbing and paving a street is not invalid because the specifications therefor require bidders to observe the provisions of the Labor Law, a part of which was declared unconstitutional before the bids were made, where the contract only provided for compliance with such provisions of the Labor Law as were in force, when the price for the work was not increased by reason of such provisions and the contract would stand unimpaired if the unconstitutional part of the Labor Law were eliminated from the specifications.

5. SAME. *It seems*, that a provision incorporated in the specifications for a street improvement that workmen must in conformity with the Labor Law be paid in cash, and not in store orders, is not unreasonable or illegal when it is required by the statute.

6. PAVING—HEARING. *It seems*, that the proceedings of a public improvement commission are not rendered invalid because abutting property owners were not given an opportunity to be again heard after the determination of the commissioners to pave with asphalt and curb with granite, although at the time of the hearing granted it was intended to pave with brick, where such hearing covered all matters pertaining to

the improvement and the commission had power by statute to change their determination as to the character of the pavement.

People ex rel. North v. Featherstonhaugh, 67 App. Div. 625, appeal dismissed.

(Argued June 13, 1902; decided October 7, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered January 14, 1902, which confirmed the proceedings of the Public Improvement Commission of the city of Cohoes in awarding a contract to the New York and Bermudez Company to curb and pave Saratoga street in that city.

The facts, so far as material, are stated in the opinion.

Lewis E. Carr for appellant. Certiorari is the appropriate remedy and brings up for review upon this appeal the entire proceedings had before, and taken by, the Public Improvement Commission of the city of Cohoes in reference to the paving and recurbing of Saratoga street, including the alleged illegal provisions contained in the specifications for such work. (Code Civ. Pro. §§ 2122, 2140; *People ex rel. v. City of Brooklyn*, 8 Hun, 56; *People ex rel. v. Lawrence*, 54 Barb. 589; *People ex rel. v. Board of Assessors*, 39 N. Y. 81; *People ex rel. v. Tubbs*, 59 Barb. 401; *People ex rel. v. Common Council of Utica*, 65 Barb. 9; *Heywood v. City of Buffalo*, 14 N. Y. 534; *People ex rel. v. Hildreth*, 126 N. Y. 360.) The determination of the commission to construct granite curb along Saratoga street at the lot owners' expense was without legal authority. It was not new work, but a repair of old work. (L. 1898, ch. 227, § 6; L. 1900, ch. 213; *People v. City of Brooklyn*, 21 Barb. 484.) The requirements imposed by the commission in its specifications are arbitrary, unreasonable, unwarranted and void. (*Meyers v. City of New York*, 58 App. Div. 534.) The requirements in the specifications, that bidders must observe the provisions of the Labor Law, were unwarranted and illegal. (*People ex rel. v. Coler*, 166 N. Y. 1; *People ex rel. v. Coler*, 166 N. Y. 144; *Meyers v. City of New York*, 58 App. Div.

534.) The requirements of the specifications that the contractor will be obliged to keep the pavement in repair without expense to the city for a period of eight years necessarily tended to impose upon property owners additional burdens and were unwarranted and illegal. (*People ex rel. v. Maher*, 56 Hun, 81; *Brown v. Jenks*, 98 Cal. 10; *E. P. Co. v. Leach*, 34 Pac. Rep. 116; *City of Portland v. Bituminous Co.*, 33 Oreg. 307; *McAllister v. Tacoma*, 9 Wash. 272; *Boyd v. City of Milwaukee*, 92 Wis. 456; *Fehler v. Gosnel*, 35 S. W. Rep. 1125.) The requirement in the specifications in reference to the payment of the workmen is unreasonable and void. (*Frorer v. People*, 141 Ill. 171; *State v. Loomis*, 115 Mo. 307; *People ex rel. v. Coler*, 166 N. Y. 19.) The provision in the specifications fixing an arbitrary price for repairs is unreasonable and void. (*Matter of Mahan*, 20 Hun, 301.) The action of the commission in awarding the contract herein to the New York and Bermudez Company was wholly void by reason of error in the preliminary proceedings. (L. 1898, ch. 227, § 13; L. 1900, ch. 213, § 4; *Merrit v. Vil. of Portchester*, 71 N. Y. 309; *Manning v. Ames*, 37 Wis. 61; *N. P. Co. v. Painter*, 35 Cal. 699; *Conde v. City of Schenectady*, 164 N. Y. 258; *Archer v. City of Mt. Vernon*, 63 App. Div. 286.) The objections of the relator to the several provisions in the specifications, including the provisions therein as to the observance by the contractor of the Labor Law and compelling said contractor to keep all work in repair for eight years after its acceptance without expense to the city, having been made prior to the final determination of the said commission to pave said street with sheet asphalt and to curb with granite curb, were timely made. (*Newberry v. Furnival*, 56 N. Y. 638; *Goldschmid v. Mayor, etc.*, 14 App. Div. 135; *Driscoll v. City of Taunton*, 160 Mass. 486.)

J. Newton Fiero and *Walter H. Wertime* for the Public Improvement Commission of the City of Cohoes, respondent. The relator has mistaken her remedy. The writ of certiorari

will not lie, since the Public Improvement Act, under which the action complained of was taken, provides another exclusive remedy. (L. 1899, ch. 550, § 14; *People ex rel. v. Bd. of Suprs.*, 153 N. Y. 370; *People ex rel. v. Brady*, 166 N. Y. 44; *People ex rel. v. Board of Suprs.*, 131 N. Y. 468; *People ex rel. v. Trustees of Palmyra*, 3 Hun, 549; *People v. Bd. of Suprs.*, 25 Hun, 131; *Roosevelt v. Draper*, 23 N. Y. 318; *Doolittle v. Bd. of Suprs.*, 18 N. Y. 155; *Wakeman v. Wilbur*, 147 N. Y. 657; *Ayres v. Lawrence*, 59 N. Y. 192.) The relator waived her rights, if any existed, to object to the provisions of the specifications. (*Conde v. City of Schenectady*, 164 N. Y. 258; *Matter of Cooper*, 93 N. Y. 507; *Matter of Washington Street*, 14 N. Y. Supp. 470; *Matter of N. Y. El. Ry. Co.*, 17 N. Y. Supp. 870; *Sentenis v. Ladew*, 140 N. Y. 463; *Mayor, etc., v. M. Ry. Co.*, 143 N. Y. 1.) The public improvement commission has power to construct the curb along Saratoga street at the expense of the abutting property owners, and its action was legal, proper and within the scope of its authority. (Elliott on Roads & Streets, 335, 336, 413; *Moran v. City of Troy*, 9 Hun, 450; *Matter of Furman Street*, 17 Wend. 649; *Denise v. Vil. of Fairport*, 11 Misc. Rep. 202; *Matter of Roberts*, 25 Hun, 371; 2 Dillon on Mun. Corp. [4th ed.] 959, § 780.) The specifications forming part of the contract requiring the contractor to keep the pavement in repair simply constitute a guaranty as to the character of the work, and not an agreement for subsequent repairs such as are required to be made by the city. (*City of Kansas v. Hanson*, 60 Kans. 833; *Robertson v. City of Omaha*, 76 N. W. Rep. 442; *Paving Co. v. Ullman*, 38 S. W. Rep. 458; *Allen v. City of Davenport*, 77 N. W. Rep. 532; *Wilson v. City of Trenton*, 40 Atl. Rep. 575; *Cole v. People*, 43 N. E. Rep. 607; *Schenectady v. Trustees of Union College*, 66 Hun, 179; *Brown v. Jenks*, 98 Cal. 10; *Osborn v. Lyons*, 73 N. W. Rep. 630; *Fehler v. Goswell*, 99 Ky. 380; *Verdin v. St. Louis*, 27 S. W. Rep. 447.) The question as to the constitutionality of the Labor Law is not

involved in the determination of this issue; the validity of the contract is not thereby affected. (*People ex rel. v. Coler*, 166 N. Y. 21.)

Harry T. O'Brien for New York and Bermudez Company, respondent. The relator by appearing before the public improvement commission and requesting that Saratoga street be paved with asphalt block, tacitly assented to the terms of the specifications under which the work would be done. She failed to raise any of the objections now urged by her at the proper time, excepting only the objection to the new curb, and by such failure she waived her right to question the terms of the specifications. (*Sentenis v. Ladew*, 140 N. Y. 463; *Lee v. Tillotson*, 24 Wend. 337; *Embury v. Connor*, 3 N. Y. 511; *Matter of Cooper*, 93 N. Y. 507; *Conde v. City of Schenectady*, 164 N. Y. 258.) The specifications forming part of the contract requiring the contractor to keep the pavement in repair simply constitute a guaranty as to the character of the work and not an agreement for subsequent repairs, such as are to be made by the city. (L. 1898, ch. 227, § 12; L. 1901, ch. 632.) The fact that the Labor Law is unconstitutional does not render the contract between the public improvement commission and the New York and Bermudez Company illegal. The provisions inserted in this contract are fairly within the discretion vested in a board of this character. (*Madden v. Van Wyck*, 35 Misc. Rep. 645; *Matter of Dugro*, 50 N. Y. 513; *Baird v. Mayor, etc.*, 96 N. Y. 567, 593; *Talcott v. City of Buffalo*, 125 N. Y. 280.) The relator, having another remedy, the writ of certiorari herein was improvidently granted and should be dismissed. (*People v. Suprs., etc.*, 43 Barb. 232; *People v. Trustees of Palmyra*, 3 Hun, 549; *People v. Bd. of Suprs.*, 25 Hun, 131; *People v. Lohnas*, 54 Hun, 604.)

HAIGHT, J. The court, upon the petition of the relator, issued a writ of certiorari to review the proceedings of the public improvement commission of the city of Cohoes in awarding a contract to the New York & Bermudez Co. to

curb and pave Saratoga street in that city from the south line of Newark street to the Mohawk river.

On the 31st day of March, 1901, the public improvement commission of the city of Cohoes caused a map and general plans, with the specifications of the work to be done for the paving and curbing of Saratoga street in that city, to be filed in the office of the clerk of the city, together with an estimate by the engineer of the cost of the improvement. They then passed resolutions unanimously directing the improvement to be made, and that notice be given for a hearing of all persons interested; thereupon a notice was published in the official paper of the city, in accordance with the provisions of the statute, of the determination made by the commissioners to pave Saratoga street between the points named with vitrified brick, and to construct a granite curb on each side of the street with receiving basins, etc., and that a meeting of the commission would be held at their rooms in the city hall on the 4th day of April, 1901, to hear all persons interested in the improvement.

On the day named for the meeting the relator and others appeared and filed a protest against the construction of the curbs with granite, and asked that the blue stone curbing, already in, be retained; and also filed a request that the pavement be made of asphalt blocks instead of vitrified bricks. Thereupon the hearing was, upon the request of the relator, adjourned until the 10th of April, 1901, at which time the testimony of several witnesses was taken, bearing upon the question of the necessity of the change from blue stone to granite curbing. At the conclusion of the testimony there was a further adjournment until the 24th of April, 1901, at which time bids were received, pursuant to a notice previously published, inviting bids for the proposed improvement with granite curbing and with the paving of either sheet asphalt, asphalt blocks, granite, Medina sandstone, repressed vitrified brick and pressed vitrified block. The relator then made further objections to the proceedings covering all the points which we shall hereinafter consider; thereupon the bids were opened,

and subsequently the contract was awarded to the New York & Bermudez Co. to pave the street with sheet asphalt and to construct the curbs of granite for the sum of \$34,753.72.

The public improvement commission of the city of Cohoes was created by chapter 227 of the Laws of 1898, and derives its powers from the provisions of that act, as amended by chapter 550 of the Laws of 1899, chapter 213 of the Laws of 1900 and chapter 632 of the Laws of 1901. The amendment of 1901, having become a law after the contract herein referred to was issued, need not now be considered. The commission being a statutory body, we shall assume that the measure of its powers is confined to the legislative acts which called it into being.

The first contention on behalf of the relator is, that the determination of the commission to construct a granite curb along Saratoga street at the lot owners' expense was without legal authority, and was not new work, but the repair of old work. We regard this contention as raising a question of fact, which was disposed of by the court below and is not reviewable in this court. The evidence tended to show that the old curbing was of blue stone; that some portions of it had been in use for many years and was badly out of repair; that none of it was set in a concrete base so as to prevent water from getting underneath; that the commissioners had determined to put the pavement and curbing upon a concrete base; that blue stone is composed of layers, some of which admit of the penetration of water, and when it freezes the stone is liable to crack; that in case of cracking it would necessitate the taking up of the curbing out of the concrete and the insertion of new curbing, which would largely increase the original cost; that granite curb when dressed and set in concrete does not allow water to reach its base, and that it is not subject to cracking or deterioration by reasons of the action of water or frost.

After the conclusion of the testimony upon the subject, the commissioners made a personal examination of the existing curbing and thereafter determined to construct the new curb

of granite instead of blue stone. In their return they state that the reasons for the determination were "That in their opinion, for the pavement on a concrete base, it would be necessary to use a curb stronger than the blue stone, and a stone which is not a layer or sandstone; that, in their opinion, the water falling upon the top of blue stone curb frequently gets in between the layers and a frost occurring under those conditions will separate the layers; and it is, in their opinion, impossible to distinguish between blue stone which will separate and one which will not." We think it cannot be held that there was not any evidence to sustain the determination of the commissioners. Under the statute the commission is given power to cause any street and highway in the city to be paved "and to construct any and all curbstones at the curb line which *it may deem necessary* for properly paving or repaving" (section 4). Also the said commission shall have power to pave any street, highway, etc., and to construct all necessary curbstones for the purpose of such paving "when and whenever the public convenience in their judgment requires the same" (section 6). It will thus be seen that the statute provides for the construction of curbing by the commissioners whenever they deem the same necessary, and whenever the public convenience in their judgment requires it; and the commissioners, as we have seen, have exercised their judgment upon the evidence to which we have alluded and determined that it was for the best interest of the public that the curbing should be constructed of granite. No question of law arises thereon which we think is reviewable in this proceeding.

In the next place, it is contended that the requirements of the specifications, that the contractor will keep the pavement in repair without expense to the city for a period of eight years, necessarily tended to impose upon the property owners burdens which were unwarranted and illegal.

Under the statute one-half of the expense of paving the street was required to be borne by the real estate adjacent and contiguous to that part of the street which the commissioners

determined to pave, and the other half was to be paid by the city at large. The specifications complained of are as follows :

“ YEARS GUARANTY OF MAINTENANCE.

“The contractor will be required to keep all his work in repair for the period of eight years from and after its acceptance by the city, without expense to the city. From the date of the acceptance of the work by the city the contractor guarantees the asphalt pavement, that he will keep it in repair for the period of eight years *as a part of the cost of the work*; that is to say, that from a date commencing with the acceptance of the work by the city to a date eight years subsequent thereto, he will maintain the asphalt pavement. The maintenance consists in repairs, renewals and furnishing materials necessary to maintain the surface of the street paved by the contractor, at all times, in a perfect state of uniformity; the uniformity of the street to be equal to that possessed by it when first accepted, and to be sufficient to present no marked hollows or projections and not to admit of water standing in depressions either on the crown of the street or in the gutters. The surface of the street shall not show any cracks, scaling off or other signs of disintegration by any action of the elements, and the pavement shall not show any wear greater than is usual with asphalt pavement of the best quality under equally heavy traffic. All imperfect work in the pavement consisting of open joints, cracks, scaling off or any other signs of failure, whenever found, are to be repaired in such manner as is prescribed heretofore for asphalt pavement.” Then follow provisions for restoring the pavement when the street has been opened by permission of the city, or by water commissioners, or abutting owners; but for such restoration the contractor is to be compensated.

In the case of *People ex rel. Hall v. Maher* (56 Hun, 81) the General Term held that an ordinance of the city, providing for the pavement of the street, containing a provision requiring the contractor to agree to keep the pavement in repair for seven years after its acceptance by the city without

expense to the city, was in effect a charge of the cost of repairs upon the property of abutting owners, and was in violation of the provision of the charter which charges such expense upon the city at large. It will readily be seen that the question raised is one of considerable importance to the public, especially to the cities whose charters provide for the construction of pavement in streets at the expense of the abutting owners of real property, or the property benefited, and that the pavement when constructed shall be kept in repair at the expense of the city. Our attention has been called to no case in this court in which the question has been decided. In the case of *Gilmore v. City of Utica* (131 N. Y. 26) the case of *People ex rel. Hall v. Maher* (*supra*) was distinguished, but the court, apparently, carefully refrained from approving of the conclusion there reached. In other jurisdictions the decisions appear to be in conflict.

The cases of *Brown v. Jenks* (98 Cal. 10; S. C., 32 Pac. Rep. 701); *Excelsior Paving Co. v. Leach* (34 Pac. Rep. 116); *City of Portland v. Bituminous Co.* (33 Oreg. 307; S. C., 52 Pac. Rep. 28); *McAllister v. City of Tacoma* (9 Wash. 272; S. C., 37 Pac. Rep. 447); *Boyd v. City of Milwaukee* (92 Wis. 456; S. C., 66 N. West. Rep. 603) may be said to be in accord with the doctrine of the case of *People ex rel. Hall v. Maher* (*supra*).

The cases which may be said to entertain a different view are: *City of Kansas City v. Hanson* (60 Kan. 833); *Latham v. Village of Wilmette* (168 Ill. 153); *Cole v. People, etc.* (161 Ill. 16); *Allen v. City of Davenport* (107 Iowa, 90-101); *Osburn v. City of Lyons* (104 Iowa, 160); *Wilson v. City of Trenton* (60 N. J. Law, 394; affirmed, 61 N. J. Law, 599); *Barber Asphalt Paving Co. v. Ullman* (137 Mo. 543); *Seaboard National Bank v. Woesten* (147 Mo. 467; S. C., 48 L. R. A. 279); *Barber Asphalt Paving Co. v. Hezel* (48 L. R. A. 285 [Mo. Supreme Court]); *Shank v. Smith* (61 N. E. Rep. 932 [Ind.]); *Barber Asphalt Paving Co. v. French* (158 Mo. 534; S. C., 54 L. R. A. 492).

In the case of *City of Kansas City v. Hanson* (*supra*) the con-

tractor agreed to maintain in good order the pavement for five years after its acceptance, and to make all repairs which may from any imperfection in the work or material, or from any crumbling or disintegration, become necessary within that time. It was further agreed that whenever any repairs were made necessary from the construction of sewers, laying of pipes or telegraph wires, or from any disturbances of the pavement by parties acting under permit of the city engineer, the contractor should restore the street and receive pay therefor. Under this contract DOSTER, Ch. J., in delivering the opinion of the court, says: "We feel quite clear that the instrument should be construed as an agreement to make such repairs only as become necessary on account of indifferent workmanship or defective material used by the contractor. In other words, it is a guaranty by the contractor of the quality of the material used, and the character of the work performed by him. The taking by the city council of such a guaranty cannot in law be held to increase the cost of the pavement, or to impose upon the property owners payment for future repairs."

In *Latham v. Village of Wilmette* (*supra*) the specifications provided that the contractor shall, without extra compensation, keep in repair for a period of two years after its acceptance, by making good any settlement or derangement of lines or grades of curbs, gutters and crossings, and by replacing defective materials or work in curbs, gutters, crossings and pavements. It was held that "This specification is no more than a guaranty that the work has been properly done and the contractor makes the agreement to repair if defective."

In the case of *Cole v. People* (*supra*) the provisions of the bond required the contractor, without further compensation, to "keep in continuous good repair all pavement laid under this contract for a period of five years." Justice MAGRUDER, in delivering the opinion of the court, says: "The provision complained of, which is quoted above, is merely a warranty or guaranty of the fitness of the material for the use intended. There is nothing in the provision to indicate that any of the

money raised by special taxation is to be applied to the purpose of maintaining the pavement and keeping it in repair."

In the case of *Barber Asphalt Paving Co. v. Ullman* (*supra*) the contract for paving included an agreement to maintain the pavement without further cost for five years. It was held that the contract did not thereby put upon the adjacent property owners any part of the cost of repairing; that the contract was a guaranty, and nothing more, for a sound pavement at the outset.

In the case of *Wilson v. City of Trenton* the contract guaranteed the endurance of the pavement for a period of five years, and the contractor agreed to maintain it in good condition, at his own expense, during that period. It was held that the repairs contemplated by the provisions of the contract were only those which arise from lack of durability of the pavement; and that such provision does not impose upon landowners abutting upon the street any burden other than that of having the pavement well constructed at the outset. We do not deem it necessary to specifically refer to the other cases above cited.

The paving companies in their endeavor to induce municipal governments to adopt their pavement are not slow in making representations as to its character and durability, and it would seem proper that some remedy should be preserved to the municipalities by which they can enforce their contracts and the representations of paving companies in this regard. It is true that the municipalities may employ inspectors to watch the pavement as it is laid, but this right has not proved to be an adequate protection to the cities. Contractors are anxious to make a large profit out of their contracts, and the temptation is strong to use cheap material and slight the work whenever it is possible for them to do so. In asphalt pavement its durability depends very largely upon the character of the work, the condition of the foundation for the pavement, and the mixture of the material used; and it is not difficult on the part of the companies to deceive the inspectors in regard thereto. A guaranty on the part of the

company, as to the durability of the pavement, affords a simple and complete remedy which fully protects the public, and when the time for which the guaranty continues is no longer than the ordinary durability of the pavement when laid with the best workmanship and material, it is not in contravention of the provisions of a municipal charter requiring repairs to be made at the expense of the city at large.

Returning to a consideration of the specifications we find them headed by the words "Years guaranty of maintenance." Then follows a provision to the effect that the contractor will be required to keep *all his work* in repair for a period of eight years; then, again, the contractor "guarantees the asphalt pavement" that he will keep it in repair "as a part of the cost of the work;" then, again, the specifications proceed to define what is meant by keeping in repair. That he is to maintain uniformity of surface and allow no hollows or projections that will admit of water standing in the depressions, and the surface of the street shall not crack, scale off or disintegrate by the action of the elements, and shall show no wear greater than is usual to asphalt pavement of the best quality in equally heavy traffic; all imperfect work, consisting of open joints, cracks, scaling off, or signs of failure, is to be repaired; then, again, the displacement or derangement caused by cuts or trenches made by others, or the authority of the city, shall be paid for.

There does not appear to be any controversy that the asphalt pavement, properly constructed with proper material upon a concrete base, will remain in good condition for the period named in the specifications, or even for a longer time. And we think the repairs required by the contract have reference to making good the imperfect work done, or the defective material used therein. In other words, that it is in effect a guaranty as to the quality and character of the pavement. If we are correct as to this construction of the specifications, it follows that no additional burden was imposed upon the abutting property owners by reason of the eight-year requirement.

It is further contended that the requirement of the specifications, that bidders must observe the provisions of the Labor Law, invalidates the contract. The specifications invite the attention of contractors to the public act relating to the limitation of the daily service of laborers and mechanics upon the public works of the cities of the state, and then quote various provisions of the Labor Law, among which are the provisions to the effect that "Contractors will punctually pay workmen, who shall be employed by them upon the work under their contract, in cash currency and not in what as is denominated store pay or orders." The specifications then call attention to sections 3 and 13 of the statute, and state that the contracts will be void and of no effect unless these provisions are complied with. The provisions referred to fix eight hours as a legal day's work, and provide that the wages shall not be less than the prevailing rate for a legal day's work, and that preference of employment shall be given to citizens of the state. The specifications evidently were prepared before the decision of our court was rendered in the case of *People ex rel. Rodgers v. Coler* (166 N. Y. 1), in which it was held that the provision of the Labor Law requiring the payment of the prevailing rate of wages was unconstitutional and void. The bids, however, were not made up and handed in until after this decision. Before the bids were made, notice was given to the contractors that the commission would not enforce the provisions of the Labor Law, which had been declared unconstitutional, and that the commission would not enforce any of the provisions of that law which may thereafter be declared unconstitutional. The bids were then made, and the superintendent of the New York & Bermudez Company, the company to whom the contract was subsequently awarded, swears that in the bid of his company, submitted to the public improvement commission, no item was included by reason of the specification providing for an observance of the provisions of the Labor Law; nor was the price set for the work increased in any wise by reason of such provisions. The contract entered into only provides that the contractor

will faithfully comply with all the provisions of the Labor Law of the state which *may now be in force*. The decision of this court in the *Rodgers* case, having been previously rendered, the provision of the Labor Law with reference to the payment of the prevailing rate of wages was not in force at the time the bids were made or the contract executed. The fact that the commissioners gave notice that they would not attempt to enforce the Labor Law, which the court had held unconstitutional, and the further fact that the bid made by the company to whom was awarded the contract was not increased by reasons of the provisions of that law, indicate very clearly that the taxpayers of the city, or the abutting owners upon the street sought to be improved, have suffered nothing by reason of the provisions of the Labor Law to which attention was called in the specifications. Some of the provisions of the Labor Law are undoubtedly constitutional and are still in force, and consequently the provisions of the contract to the effect that the contractor will observe those provisions, which may now be in force, furnish no ground for just complaint. A contract, the consideration of which is based upon a statute which is unconstitutional, is doubtless void. But the contract in this case does not depend upon the Labor Law for its consideration. The provisions of that statute incorporated into the specifications are extraneous matters which have no material effect upon the main provisions of the contract, and cannot affect those provisions unless it may tend to increase the cost of the work. The contractors must be presumed to have known the law, and consequently to have known that the provision with reference to the rate of wages was unconstitutional. They are deemed, therefore, to have made their bid with this understanding, even independent of the notice which was given to them by the commissioners. Their bid was not in fact increased by reason of the Labor Law, as appears from the testimony to which we have alluded. We think, therefore, that the provisions of the Labor Law which have been held unconstitutional may be eliminated from the specifications, and that the contract may stand unimpaired and

in full force and virtue. This was in effect held in the case of *People ex rel. Rodgers v. Coler* (*supra*). In that case the contractor sought a peremptory writ of mandamus to compel the comptroller to deliver to him a warrant on the chamberlain for the amount due him upon the contract, which was a contract in all essential features like the one now under consideration. The comptroller refused to deliver the warrant for the reason that the contractor had not complied with the provisions of the contract, which required him to pay the laborers employed by him the prevailing rate of wages. It was held that that provision of the Labor Law which had been incorporated into a contract was unconstitutional and void; but that the remaining part of the contract was in full force, and the mandamus was ordered to be issued.

The provisions of the specifications to the effect that laborers must be paid in cash and not in store orders is a requirement of the statutes which, as yet, has not been condemned in this state. The objection taken to this specification was that it is erroneous, unreasonable, illegal and unauthorized. It is not unreasonable or illegal if authorized by a statute. Our attention has been called to no provision of this, or any of the charters of the cities of this state, which permits the treasurer or other financial officer of a municipal government to keep a store and pay the employees of the city with orders on the store. It may be different, however, with contractors; but as we have seen, this specification is required by the statute, and no objection was taken, upon the ground that the statute was unconstitutional, and it is not the practice of this court to determine the constitutionality of statutes unless the question is distinctly raised by the record.

Finally, it is contended that the determination of the commissioners to pave with sheet asphalt and to curb with granite was made by the commission without an opportunity of the abutting property owners to be heard on such determination. It is true that in the notice given for a hearing it was stated that the commission had determined to pave with vitrified brick, and a hearing was had upon that notice. The hearing,

however, covered all matters pertaining to the improvement, the kind of pavement to be used, as well as the kind of curbing. The statute makes provision for the hearing, and then concludes: "Said commission shall have the power to change, alter, add to or modify their first and original determination in reference to such improvement, and shall also have the power and right to change their opinion in reference to what portion of the whole expense should be paid by local assessment." After the hearing it appears that the commission did change their determination as to the character of the pavement it would adopt, and finally concluded to use sheet asphalt instead of brick.

Other questions have been discussed in the briefs of counsel which we have considered, but they present no error that requires a reversal of the proceedings, and we do not deem it necessary to specifically refer to them.

In view of the fact that a large number of persons will become interested as taxpayers when an assessment is made to pay for the improvement contracted for, we have thought it wise to consider this case upon the merits. We are, however, of the opinion that the proceedings sought to be reviewed are neither judicial nor quasi-judicial, and, therefore, under the well-settled rules are not subject to review by certiorari. (*People ex rel. Trustees, etc., v. Bd. Supervisors of Queens Co.*, 131 N. Y. 468; *People ex rel. O'Connor v. Bd. Supervisors of Queens Co.*, 153 N. Y. 370, 374.)

The appeal should, therefore, be dismissed, with costs.

PARKER, Ch. J., GRAY, O'BRIEN, VANN, CULLEN and WERNER, JJ., concur.

Appeal dismissed.

JOHN E. OTTAWAY, Appellant, v. MARY ANN LOWDEN,
Respondent.

PUBLIC HEALTH LAW — L. 1893, CH. 661, § 148, CURING DEFECTS IN IMPERFECT REGISTRATION OF PHYSICIANS, RETROACTIVE. Where a physician, who came from another state and possessed all the qualifications required by the statute for the practice of medicine in this state, upon his registration in 1886, through inadvertence, omitted to file with his affidavit the indorsement of a medical school in the state, as required by the statute (L. 1880, ch. 513, § 4), the effect of which was to render the registration imperfect, the registration in 1899 of a regents' certificate curing the defect, issued pursuant to section 148 of the Public Health Law (L. 1893, ch. 661), validates the original registration from the date of its filing, wipes out all liability to prosecution for the various misdemeanors committed by him in practicing during the time of imperfect registration, and renders legal his contracts of employment.

Ottaway v. Lowden, 55 App. Div. 410, reversed.

(Argued June 27, 1902; decided October 7, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 24, 1900, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the Monroe County Court and an order denying a motion for a new trial.

Plaintiff brings this action to recover the value of certain services rendered by him as a physician and surgeon in behalf of defendant. Plaintiff was graduated from the University of Michigan at Ann Arbor in 1886, and received a diploma from that institution bearing date the first day of July in that year.

Shortly thereafter he removed to this state and commenced practicing at Penn Yan in Yates county. On October 8, 1886, he filed with the county clerk an affidavit stating his age, residence, place of birth and authority for practicing as required by section 2, chapter 513, Laws of 1880. But he omitted to accompany such affidavit with the indorsement of the faculty of a medical school of this state, required by section 4 of the same chapter, in consequence of which the affidavit was confessedly insufficient.

In 1889 plaintiff removed to Charlotte, in Monroe county, and on the 18th day of November in that year he presented to the county clerk a certified copy of the affidavit filed by him with the clerk of Yates county with these words indorsed thereon : "Registered also in the County of Monroe."

The services sued for here were rendered in 1894. In 1899, plaintiff, having discovered that his former registration was imperfect, applied to the board of regents for a certificate which should cure such imperfection. This application was granted, and on February 14, 1899, a regents' certificate was filed in the clerk's office of Monroe county. This certificate, which was based upon the recommendation of the state board of medical examiners, bearing date January 17, 1899, reads as follows, viz. :

"The Regents of the University of the State of New York hereby certify :

"That John E. Ottaway, of the Village of Charlotte, N. Y., did in the year 1886 present to the County Clerk of Yates County, N. Y., an M. D. diploma issued to said Ottaway by the University of Michigan, July, 1886, and that he made the affidavit before the said Clerk then required of persons who applied for licenses to practice medicine and that said affidavit was duly filed in the office of the Clerk of Yates County.

"That thereafter, on the 18th day of November, 1889, the said John E. Ottaway presented to the Clerk of the County of Monroe, N. Y., a certified copy of the affidavit filed by him with the clerk of Yates County, who endorsed thereon the words 'Registered also in the County of Monroe.'

"That said attempted registration of Dr. Ottaway in each of the said counties was invalid for the reason that he had not exhibited his diploma to the faculty of some duly incorporated medical school or college in this state and received from them an indorsement of approval and has not presented his diploma with such indorsement to the County Clerk of Yates County ; that such omission was wholly unintentional.

"We further certify that Dr. Ottaway had all the other requirements prescribed by law at the time of his imperfect

N. Y. Rep.]

Statement of case.

registration and would have been entitled to be legally registered.

"We also certify that proof of the foregoing facts have been submitted to the State Board of Medical Examiners and that they have unanimously recommended that the imperfect registration of said John E. Ottaway in the counties of Yates and Monroe be made valid.

"In witness whereof the seal of the University of the State [L. s.] of New York is herenunto affixed this 2nd day of February, 1899.

"JAMES RUSSELL PARSONS, JR.,

"Deputy Secretary.

"Certified by HERBERT J. HAMILTON,

"Examiner."

This certificate was issued pursuant to section 148, chapter 661, Laws of 1893, known as the "Public Health Law."

The trial court granted a nonsuit which was affirmed at the Appellate Division, and from that judgment the plaintiff appeals to this court.

Patrick J. Dobson for appellant. Section 148 of the Public Health Law authorizes the correction of an imperfect registration. If this has been done it does not matter whether or not the plaintiff possessed a license. Having a correct registration he needs nothing more. (*Stief v. Hart*, 1 N. Y. 20; *Mayor v. Sands*, 105 N. Y. 210; *People v. Chapin*, 105 N. Y. 309; *Whitaker v. Masterton*, 106 N. Y. 277; *Mayor v. Bigelow*, 13 Misc. Rep. 42.) The regents and state medical board had jurisdiction of the subject-matter; therefore their certificate is conclusive. It cannot be attacked in this action. (*People v. N. Y. M. C. & Hospital*, 20 N. Y. Supp. 379; *State v. Gregory*, 83 Mo. 123; *People v. Dental Examiners*, 110 Ill. 180; *Van Fleck v. Board Dental Examiners*, 48 Pac. Rep. 223; *Vanderheyden v. Young*, 11 Johns. 158; *People v. Trustees*, 39 N. Y. Supp. 611; *People v. Beady*, 166 N. Y. 47; *Matter of Walker*, 68 App. Div. 196; *People v. Board of Health*, 140 N. Y. 1; *Osterhoudt v.*

Rigney, 98 N. Y. 234.) Assuming that the court may attack the certificate of the regents collaterally, which is denied, the language of the statute authorizes the correction of the errors in appellant's registration. (*People v. Potter*, 47 N. Y. 375; *Weed v. Tucker*, 19 N. Y. 422; *Dayton v. Johnson*, 69 N. Y. 419; *Berger v. Varrelmann*, 127 N. Y. 281; *Potter's Dwaris* on Stat. 231; *Black* on Interp. of Laws, 307; *Blashko v. Wurster*, 156 N. Y. 437; *Whitaker v. Masterton*, 106 N. Y. 277; *Raynard v. Chase*, 1 Burr. 2; *Weed v. Tucker*, 19 N. Y. 433; *Stief v. Hart*, 1 N. Y. 20; *Mayor, etc., v. Sands*, 105 N. Y. 210; *People v. Chapin*, 105 N. Y. 309.) The provision of section 148 in question is retroactive, makes the registration valid from the date it was made, and authorizes a recovery for services rendered since the erroneous registration. (*Black* on Interp. of Laws, 261; 1 Kent's Comm. 455; *People v. Spicer*, 99 N. Y. 299; *Whitaker v. Masterton*, 106 N. Y. 277; *Cooley's Const. Lim.* [6th ed.], 464; *Ewell v. Daggs*, 108 U. S. 143; *Gross v. U. S. Mfg. Co.*, 108 U. S. 477; *W. W. V. W. Co. v. Valette*, 21 How. Pr. 414; 2 Beach on Contracts, § 2120; *Curtiss v. Leavitt*, 15 N. Y. 9; *Washburn v. Franklin*, 35 Barb. 599.) The equities of the case are with appellant. (*Weed v. Tucker*, 19 N. Y. 433; *People v. Spicer*, 99 N. Y. 229; *Whitaker v. Masterton*, 106 N. Y. 277; *N. Y. & N. H. R. R. Co. v. Schwager*, *Cross & Co.*, 17 N. Y. 604; *Wiles v. Snyder*, 64 N. Y. 178; *People v. Chapin*, 105 N. Y. 309; *People v. Connor*, 95 N. Y. 559.)

John Desmond for respondent. The plaintiff failed to show that he had a license to practice physic and surgery in the state of New York at the time of making the alleged contract with the defendant, and he, therefore, failed to prove the essential part of his cause of action. It follows the nonsuit was properly granted. (L. 1880, ch. 513, §§ 2, 4; L. 1884, ch. 411; L. 1887, ch. 647, §§ 1, 2, 10; L. 1890, ch. 500, § 2; L. 1893, ch. 661, §§ 140, 148; *Johnston v. Dahlgren*, 166 N. Y. 354; *Fox v. Dixon*, 34 N. Y. S. R. 710; *Accettu v.*

N. Y. Rep.] Opinion of the Court, per PARKER, Ch. J.

Zupa, 54 App. Div. 34; *O'Connor v. Francis*, 42 App. Div. 375; *Demming v. Young*, 50 L. R. A. 103.) A physician must not only be duly licensed, but he must register that license or he cannot recover for services in an action. (*Johnston v. Dahlgren*, 166 N. Y. 354.) Neither the regents nor the state medical board had any jurisdiction to entertain a proceeding to make valid a license, but their jurisdiction was limited to a proceeding to correct an invalid registration, which was invalid because of an omission to comply with some provision of law relating to registration. (*Warren v. Union Bank*, 157 N. Y. 274; *County of Monroe v. City of Rochester*, 154 N. Y. 570; *Baird v. Board of Suprs.*, 138 N. Y. 95.) The provision in section 148, relative to the correction of an invalid registration, will not be given a retroactive effect, and it certainly will not permit the regents to supply plaintiff with a license which will be given a retroactive effect. (*G. & W. R. R. Co. v. N. Y. C. & H. R. R. Co.*, 163 N. Y. 228; *N. Y. & O. M. R. R. Co. v. Van Horn*, 57 N. Y. 473; *O'Connor v. Francis*, 42 App. Div. 375; *Fox v. Dixon*, 34 N. Y. S. R. 710; *Demming v. Young*, 50 L. R. A. 103.)

PARKER, Ch. J. The question which divided the court below is a very close one indeed, involving the inquiry whether § 148, ch. 661, Laws of 1893, is retroactive in its operation. The statute provides, among other things, that "On receiving from a state board an official report that an applicant has successfully passed the examinations and is recommended for license, the regents shall issue to him, if in their judgment he is duly qualified therefor, a license to practice medicine. * * * If any person, whose registration is not legal because of some error, misunderstanding or unintentional omission, shall submit satisfactory proof that he had all requirements prescribed by law at the time of his imperfect registration and was entitled to be legally registered, he may, on unanimous recommendation of a state board of medical examiners receive from the regents under seal a

certificate of the facts which may be registered by any county clerk and *shall make valid the previous imperfect registration.*"

The query is whether the effect of the registration of such a regents' certificate curing defects in an imperfect registration, validates the original registration from the date of its filing, or from the date of the filing of the later certificate. If the former be its legal effect, it wipes out all liability to prosecution for misdemeanors committed by one practicing during the time of imperfect registration, and renders legal the practitioner's contracts of employment. If the latter construction be the true one, his practice is legal only from the date of the filing of the later certificate, and he remains liable to be punished for such misdemeanors, for the statute provides that to practice without such registration as it calls for is to commit a misdemeanor.

The facts of this case, so far as we need consider them, are that plaintiff attempted to make registration as required by the statute and failed; but, assuming that he was correctly registered he proceeded with the practice of medicine, in the course of which he rendered services to defendant, to recover the value of which this action is brought. A short time thereafter he obtained from the regents a certificate which both the majority and minority opinions below assume, and correctly, as we think, made valid the previous imperfect registration.

We are persuaded that the statute operated to give life to the imperfect certificate from the date of its filing, and, hence, authorized the plaintiff to recover for all services rendered after its filing, and freed him from the various misdemeanors as well.

The object of the comprehensive statutes of which the section quoted from forms a part is not to provide a trap for the *bona fide* and competent physician who, through inadvertence or ill advice, fails to secure a perfect registration, but to shut out from the practice of medicine those whose lack of knowledge of the human body and ignorance touching methods of treat-

N. Y. Rep.] Opinion of the Court, per PARKER, Ch. J.

ment render their attempts to make diagnosis and prescribe treatment a menace to society.

Not only is the standard very high for those who are admitted to the practice of the profession by the authorities of this state, but the statutes attempt to guard against any practicing in this state by unskillful and improper practitioners coming from sister states, and to that end it is required that if a practitioner holds a diploma issued to him by a medical school without the state he shall exhibit the same to the faculty of some medical school of this state with satisfactory evidence of his good moral character, and such other evidence of his qualifications as a physician or surgeon as said faculty may require, and if approved they shall indorse the diploma, which makes it the same as if issued by them. (§ 4, ch. 513, Laws of 1880.) And a later statute provided for such approval and indorsement by the regents on recommendation of a board of medical examiners of this state. (§ 2, ch. 647, Laws 1887.)

These acts and later ones (Ch. 500, Laws of 1890; ch. 661, Laws of 1893), amending the law in some respects, show throughout an intent on the part of the legislature to protect the people from imposition by the unlearned and unskillful who may nevertheless obtain from institutions in other states diplomas purporting to assure competency. To that end the certificate of the board of regents, based upon the unanimous recommendation of a board of medical examiners, is exacted, and the requirements of license and registration are insisted upon, and *not* for the purpose of bringing within the penalties of the statutes a physician coming from another state possessed of all the qualifications which the statutes require.

As experience teaches that mistakes are sometimes made in attempting to comply with statutes, especially by those whose training may be in other directions than the law, the legislature has undertaken to provide a method by which imperfect registration may be corrected by the same authorities who acted in the first instance; and as the object of the section authorizing the correction is only to make such corrections as are due to "some error, misunderstanding or unintentional

omission," there is no good reason why the legislature should not provide that the correction shall operate as of the date when the "imperfect registration" took effect, thus wiping out the penalties which the statute imposed to better secure its enforcement. If such was not the intention of the legislature, a much shorter and differently worded section authorizing him to again take the steps which the statute required in the first instance would undoubtedly have been enacted. Instead of that, as we have seen from a reading of the section, the legislature seems to have provided for so correcting the imperfect registration as to give it the same effect as if it had been perfect in the first instance. It speaks as of the time when the imperfect registration was made, for it requires the applicant for correction to submit "satisfactory proof that he had all the requirements prescribed by law." When? Not at the time of the application for correction, but "at the time of his imperfect registration." And it requires him to show, not that he is now entitled to be legally registered, but that he was so entitled at the time of the filing of the imperfect registration. And then the portion of the section covering that subject concludes with the provision that upon this proof and upon receiving from the regents, under seal, a certificate of the facts, based upon the unanimous recommendation of the state board of medical examiners, which certificate may be registered by any county clerk, it "*shall make valid the previous imperfect registration.*" This phrase, as it seems to us, when considered in connection with the general scheme of the statute, and the fact that all of the applicant's proofs must go to show that he was entitled to be registered at the time of his imperfect registration, means that that which was once imperfect and invalid shall become perfect and valid as of the beginning.

The judgment should be reversed and a new trial granted, with costs to abide the event.

O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ., concur.

Judgment reversed, etc.

EDMUND J. LOWRY, Respondent, v. THE FARMERS' LOAN AND TRUST COMPANY et al., Appellants, Impleaded with Others.

1. CORPORATIONS—STOCK DIVIDENDS DECLARED OUT OF PROFITS REPRESENT INCOME NOT CAPITAL. Where a corporation has declared a dividend upon its capital stock payable in new stock certificates, if it is based upon an accumulation of earnings or profits, by their distribution in that manner the stockholders receive the representative of income and not of capital.

2. TRUSTS—WHEN LIFE BENEFICIARY IS ENTITLED TO STOCK DIVIDENDS AS INCOME. Where the will of a testator creates a trust during the life of a beneficiary with remainder to his heirs and directs that the entire income of the securities of the trust fund is to be applied as income and that no part of such income shall be diverted to the formation of a sinking fund to replace any loss of the principal by depreciation in value of the securities, such provisions, with others indicating a comprehensiveness of intention with respect to the enjoyment by the beneficiary of the income in connection with the source of the dividend itself, entitle the life tenant and not the remainderman to a stock dividend declared out of "an accumulated net surplus" upon the stock of a corporation in which a portion of the trust estate was invested.

Lowry v. Farmers' Loan & Trust Co., 56 App. Div. 408, affirmed

(Argued June 19, 1902; decided October 7, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 8, 1901, upon an order reversing a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term and directing judgment for the plaintiff.

The action involves the construction of the provisions of the will of John Lowry, who died in 1895. In the seventh clause, the will set apart one fourth of the residuary estate, to be held by the Farmers' Loan and Trust Company, in trust to apply the rents, issues and profits thereof to the use of the testator's widow, until her death, or remarriage; in either of which events the trust property should go "to increase the portion of the estate held in trust for the benefit of my children as hereinafter stated." By the second subdivision of the same clause, the residuary estate was to be divided by the executor, the defendant trust company, into shares for the testator's children and one of said shares was given to it "in

trust, to receive the rents, issues and profits thereof, and to apply the same to the use of each one of my children who may survive me, during the natural life of such child, and, after the death of each child, to pay over the principal of such trust fund to the right heirs of such deceased child." The eleventh clause of the will provided that "The trustee under my will and its successor, in addition to the ordinary powers of trustees in such cases, shall have full power to retain the trust fund in any securities in which the same may be invested at the time of my death," and that "When any investment of trust funds has been made by purchase of securities, such securities shall form part of the principal of the trust fund and follow the trust; and the entire income from such securities shall be applied as income, irrespective of the price paid for the securities or the subsequent value thereof; it being my will that no part of such income shall be diverted to form a sinking fund to replace any loss to the principal by depreciation in value of the securities." The plaintiff is one of the surviving children of the testator and brought this action to compel the trustee to account for, and to pay over to him, an extra dividend of fifty per cent, which had been declared upon the capital stock of the Pullman Palace Car Company, payable in certificates of stock at par value. The testator's estate comprehended fifty shares of the stock; eight of which formed part of the trust estate held for plaintiff. The dividend had been declared and paid from the "accumulated net surplus at the credit of income account;" as the same appeared in the accounts of the company. This accumulation of surplus had existed at approximately the same figure for a time prior to testator's death. At the Special Term, the complaint was dismissed; upon the ground that the stock dividend should be treated as principal and, therefore, should be held for the remaindermen. The Appellate Division of the first department, holding that the stock dividend should be treated as income, reversed that judgment and ordered a judgment for the plaintiff. The trust company thereupon appealed to this court.

David McClure for The Farmers' Loan and Trust Company, appellant. The testator, at the time of his death, as a shareholder of the car company, had a fixed right in reference to all the assets of the corporation in the ratio which the number of shares held by him sustained toward the entire capital stock of the corporation. (*Jermain v. L. S. & M. S. R. Co.*, 91 N. Y. 483; *Burrall v. B. R. R. Co.*, 75 N. Y. 211; *Kent v. Q. M. Co.*, 78 N. Y. 159; *People ex rel. v. Coleman*, 126 N. Y. 433; *Plimpton v. Bigelow*, 93 N. Y. 502.) The laws of this state recognize the fact that the interest of a decedent in the surplus earnings of a corporation at the time of his death is capital and not income. (*Matter of Bronson*, 150 N. Y. 1; *Matter of Fitch*, 160 N. Y. 87.) A stock dividend neither increases nor diminishes the assets of the corporation, but only indicates a transformation in the manner in which the property of the corporation is held. (*Williams v. W. U. T. Co.*, 93 N. Y. 162; *Rogers Case*, 22 App. Div. 428.) The stock dividend in the present case should be declared to be principal and not income. (*Matter of Rogers*, 161 N. Y. 108.)

Alfred Roelker, Jr., for Muriel Valentine, appellant.

Clinton E. Bell and *Eugene H. Lewis* for respondent. A corporation is a distinct and separate entity apart from its shareholders, who have merely choses in action against the separate entity. (*Burden v. Burden*, 159 N. Y. 287; *Jermain v. L. S. & M. S. R. Co.*, 91 N. Y. 483; *Plimpton v. Bigelow*, 93 N. Y. 592; *Vail v. Hamilton*, 85 N. Y. 453; *Matter of Bronson*, 150 N. Y. 17; *Matter of Whiting*, 150 N. Y. 27; *Matter of Morgan*, 150 N. Y. 235.) A stockholder in the absence of bad faith has no legal or equitable title to surplus profits of a going concern until the declaration of a dividend. (*Greff v. E. L. Assur. Society*, 160 N. Y. 19; *Hyatt v. Allen*, 56 N. Y. 553; *Goldsmith v. Swift*, 25 Hun, 201; *Button v. Hoffman*, 61 Wis. 20; *Burden v. Burden*, 159 N. Y. 287.) The testator's intention should be construed in accordance with the foregoing established principles

of corporation law, taking into consideration the express language of the will, the scope and purpose of the will as a whole, together with all the surrounding circumstances, and considering especially the relationship of the testator to the plaintiff. (*Du Bois v. Ray*, 35 N. Y. 162; *Matter of Hoyt*, 160 N. Y. 607; *Hyatt v. Allen*, 56 N. Y. 553; *Steinway v. Steinway*, 163 N. Y. 197; *Clarkson v. Clarkson*, 18 Barb. 646; *Matter of Gerry*, 103 N. Y. 451; *Matter of N. Y. L. Ins. & T. Co.*, 53 N. Y. Supp. 382.) Where a testator leaves as part of his estate shares of stock, the income of which he desires to be paid to his children, and the corporation in which the testator held such stock continues its corporate existence and declares an extra dividend out of accumulated earnings, whether such dividend be in cash or stock, such dividend shall be paid to the life tenant, without reference to the time when it may have been earned by the corporation. (*Riggs v. Cragg*, 89 N. Y. 479; *Clarkson v. Clarkson*, 18 Barb. 646; *Matter of Woodruff*, 1 Tuck. 58; *Goldsmith v. Swift*, 25 Hun, 201; *Matter of Kernochan*, 104 N. Y. 618; *Matter of Warren*, 33 N. Y. S. R. 584; *Matter of Prime*, N. Y. L. J. March 6, 1891; *McLouth v. Hunt*, 154 N. Y. 179; *Matter of Hoyt*, 160 N. Y. 615.) The distinction made by the court below between a stock dividend and a cash dividend is a distinction without a difference for the purposes of this case. (*Riggs v. Cragg*, 26 Hun, 89; 89 N. Y. 479.) Any apportionment of the earnings of a going concern is contrary to the established law of this state. (*Riggs v. Cragg*, 26 Hun, 89; *Simpson v. Moore*, 30 Barb. 637; *Goldsmith v. Swift*, 25 Hun, 201; *Matter of Rogers*, 22 App. Div. 428; 161 N. Y. 108.) To decide that the stock dividend is principal of the estate is to imply an illegal and void intention on the part of the testator. (*Manning v. Q. S. M. Co.*, 24 Hun, 360; *Hascall v. King*, 162 N. Y. 134; *Pray v. Hegeman*, 92 N. Y. 508; *Matter of Rogers*, 22 App. Div. 428.) The court will not imply a void and illegal intention, but, where two interpretations are possible, the court will choose the one making the will valid. (*Hopkins v. Kent*, 145

N. Y. Rep.] Opinion of the Court, per GRAY, J.

N. Y. 367; *Tilden v. Green*, 130 N. Y. 66; *Arthur v. Arthur*, 3 App. Div. 378.)

GRAY, J. The object of this action was to have it determined that, as between the plaintiff, the beneficiary of a trust created by the testator's will, and those entitled in remainder to the trust fund, the shares of stock received by the trustee, in payment of a dividend of fifty per cent, which had been declared by the Pullman Palace Car Company upon its capital stock, were to be regarded, and treated, as income of the trust estate. The question whether the life tenant of property, or the remainderman, should have the dividend, which a corporation has declared and has made payable in certificates of its stock, has been a vexed one. The decisions of the courts in this country and in England have not been harmonious and in this state, it may be said, it had received no authoritative treatment by this court, until the decision of the recent case of *McLouth v. Hunt*, (154 N. Y. 179). Several decisions of the Supreme Court of this state had, previously, given support to the doctrine that where a life tenant is given the income and profits, and specifically, in some cases, dividends, all dividends, whether payable in cash, or in certificates, belonged to him. (*Clarkson v. Clarkson*, 18 Barb. 646; *Simpson v. Moore*, 30 ib. 637; *Riggs v. Cragg*, 26 Hun, 89.) When the case of *Riggs v. Cragg* came to this court, (89 N. Y. 479), this question, though passed upon below, was not decided; the appeal being determined upon other grounds. It was there observed in the opinion, that the question had not been considered by this court and that, in view of the conflict in the decisions elsewhere, it would be its duty, when the occasion arose, to settle the question upon principle. That occasion did arise, when the appeal in *McLouth v. Hunt*, (*supra*), came before this court. In *McLouth v. Hunt*, the direction was to pay over to the beneficiary "the full income" and the question presented was, whether a stock dividend, declared by the Western Union Telegraph Company, some four years after the testator's death, should be treated as income, pay-

able to the life tenants, or as accession to the capital of the trust fund. The company, as the facts are stated, in 1892, "by a capitalization of accumulated earnings made and retained in its hands, from time to time, increased its capital stock from \$86,200,000 to \$100,000,000 and, predicated thereon, made a stock dividend of ten per cent to its stockholders;" the resolution reciting that the earnings of the corporation had been withheld from the stockholders for almost ten years; that they had accumulated, and that they were distributed in the form of stock certificates instead of money. It was pointed out in the opinion that the substance and intent of the corporate action were to distribute earnings and that there was no addition made to the capital; for, notwithstanding that there resulted an increase of capital stock, the corporation had neither more property, nor more capital. It was held that the transaction, although in the form of an issue of stock certificates, was a distribution of the profits and that what the stockholders got "represented income and was income." The opinion discussed the question with some fullness, as an undetermined one in this court, and a further review of the cases is unnecessary now. Aside from cases which are substantially parallel in their facts and, therefore, within the precedent, under the authority of *McLouth v. Hunt*, courts will determine for themselves, "according to the nature and substance of the thing which the corporation has assumed to transfer," whether a dividend, when declared, represents income, or not. That case was a stronger one, in some aspects, than the present one for the remainderman. The rule, as settled by that case, is that where a corporation has declared a dividend upon its capital stock, payable in new stock certificates, if it is based upon an accumulation of earnings, or profits, by their distribution in that manner, the stockholders receive the representative of income and not of capital. I do not think that it is possible to distinguish that case, as an authority upon the question before us. It may be true, as the appellant contends, that *McLouth v. Hunt* declared no hard and fast rule, that stock dividends are always to be treated as

income, and that each case must be decided upon its own facts; but the general rule, which it enunciated, seems to apply very exactly to the conditions of the present case.

In approaching the consideration of such a question, the language in which the gift is made to the beneficiary of a trust, or the life tenant of the estate, must be regarded, in order to determine, preliminarily, the comprehensiveness of the testator's intention, with respect to the enjoyment by the object of his bounty of the yield of the intermediate estate. Then the transaction, through which the property of the corporation is being distributed in the extraordinary form of a stock dividend, is to be looked into; in order that its true nature may appear and that a determination may be reached, whether capital, or an accumulation of profits on the capital, is being divided among the stockholders. While the corporate action may not be, necessarily, conclusive upon the court, with respect to the question, if it is based upon facts, and is not purely arbitrary, it will, and should, be controlling. In the first place, then, we have, in this will, a provision made by a parent for his child; which gives to the latter the "rents, issues and profits" of his equal share of the residuary estate, during his life. Upon the remarriage, or the death, of the testator's widow, that share is to be proportionately increased by the distribution of the one-fourth share, which had been held in trust for the widow. Further, the testator directed that the entire income of the securities of the trust fund was to be applied and that no part should be diverted to the formation of a sinking fund to replace any loss of the principal by depreciation in value of the securities. These provisions, certainly, evidence a comprehensive intention of the testator that whatever was in the nature of profits upon, or income of, the trust fund should be fully enjoyed by the beneficiary. In the next place, we have the trustee receiving from the Pullman Company, upon the shares of its stock held in trust, a dividend of fifty per cent, paid out of "accumulated net surplus at the credit of income account," in certificates of new stock of the corporation. The fact of the source of the divi-

dend appeared from the company's statement; which showed an accumulation of net surplus from year to year, for thirty-one years. A cash dividend of twenty per cent had been declared a short while previously; which the trustee had paid over to the plaintiff. Had this dividend of fifty per cent been declared and paid in cash, would there have been much doubt about the plaintiff's right to receive it? (*Matter of Kernochan*, 104 N. Y. 618, 629.) What reasonable, or substantial, distinction is there, in principle of ownership, between a dividend which is paid in stock and one which is paid in money, when either is based upon a division of earnings? Mr. Morawetz, in his work on Corporations, (§ 468), has observed, with respect to such stock dividends, that, "in substance and effect, it amounts to a distribution of profits among the shareholders in cash and a subsequent purchase of new shares in the company with the sums distributed." It is true enough, as the appellant argues, that the testator, at the time of his death, owned the right to share in the assets of the corporation, proportionately to the amount of stock which he held; but it does not, therefore, follow that dividends, thereafter made from the accumulations of earnings, must be regarded and treated as additions to the capital of the trust estate. All stockholders are interested in the operation of the property of a corporation and their shares of stock represent individual interests in the corporate enterprise, in its capital, as in its net earnings; but the corporation itself has the legal title to all the properties and holds them for their benefit. They have a right to dividends, only as the corporate agents, in the exercise of their discretion, may declare them, (in the absence, of course, of any question of bad faith, neglect, or abuse of discretion), and they have the right to a *pro rata* distribution of the corporate assets upon dissolution. (*Jermain v. L. S. & M. S. R. Co.*, 91 N. Y. 483; *Plimpton v. Bigelow*, 93 ib. 592; *Matter of Bronson*, 150 ib. 1; *Greeff v. Equitable L. Assur. Socy.*, 100 ib. 19.)

The declaration of a dividend by a corporation in active operation is the appropriation of a portion of the assets, which

N. Y. Rep.] Opinion of the Court, per GRAY, J.

represented the net earnings of the corporation, for the use of the stockholders and, *pro tanto*, the assets are diminished. The stock no longer represents them. The capital is unchanged; but the value in the market of the shares may be affected by the diminution in the amount of the corporate assets. That the value of the shares of stock has been lessened by a dividend is a fact of no relevancy in determining the question of whether the dividend is to be regarded as income to the life tenant, or as capital for the remainderman. That question will be determined by the origin of the dividend. In this case, a fund had been created by an accumulation of the net earnings of the corporation and it remained a part of the general assets, until, in the judgment of the directors, the time came when it was proper and prudent to distribute it among the stockholders. That which the directors of the corporation distribute among its stockholders, without intrenching upon capital, must be comprehended within the term "profits" and we should assume that the testator intended that what might be paid in that way should belong to the beneficiary.

There is no question of diminishing the capital; nor of increasing the capital for any corporate purpose, or need. It was, simply, a mode of distributing the profits earned by the employment of the capital.

Enough has been said, in connection with the authority of *McLouth v. Hunt*, to render the conclusion necessary that the judgment of the Appellate Division should be affirmed; with costs to the plaintiff and to the defendant trustee, to be paid out of the principal of the fund.

PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN, VANN and CULLEN, JJ., concur.

Judgment accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, 'Respondent, v.
FRANK P. ELLIOTT, Appellant.

1. CRIMES — SECTION 830 OF THE CODE OF CIVIL PROCEDURE, RELATING TO THE READING ON SECOND TRIAL OF TESTIMONY OF DECEASED WITNESS TAKEN ON FIRST TRIAL, APPLICABLE TO CRIMINAL TRIALS. While there is no express provision of the Code of Criminal Procedure authorizing the reading on a second trial of the testimony of a deceased witness sworn at the first trial of a criminal action, section 830 of the Code of Civil Procedure, authorizing the reading of such testimony taken at the former trial of an action, is also applicable to a criminal action since the word "action," as defined in section 3333 of the Code of Civil Procedure, refers to both civil and criminal actions.

2. WHEN RIGHT OF CONFRONTMENT PROVIDED FOR IN SUBDIVISION 3, SECTION 8, CODE OF CRIMINAL PROCEDURE, IS NOT VIOLATED. The right of the accused to be confronted with the witnesses against him in the presence of the court, provided for in subdivision 3 of section 8 of the Code of Criminal Procedure, which is merely a re-enactment of section 14 of the Bill of Rights, is not violated by the reading of such testimony on the second trial, where only such testimony is read as was taken on the first trial in the presence of the accused, represented by counsel exercising the full right of cross-examination, and, therefore, the accused has been once confronted by the witness against him in the presence of the court.

People v. Elliott, 66 App. Div. 179, affirmed.

(Argued June 16, 1902; decided October 7, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 26, 1901, affirming a judgment of the Chenango County Court entered upon a verdict convicting the defendant of the crime of rape in the second degree and an order denying a motion for a new trial.

The facts, so far as material, are stated in the opinion.

John P. Wheeler for appellant. It was error to admit the evidence of Dr. Brooks, given on the former trial. (*People v. Murphy*, 101 N. Y. 126; Code Civ. Pro. § 834.)

Wordsworth B. Matterson for respondent. It was not error for the court to permit the reading of the evidence of Dr. Brooks, taken upon the former trial. (Code Civ. Pro. §§ 830, 3333, 3335, 3336; Code Crim. Pro. §§ 8, 392.)

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

BARTLETT, J. This defendant has been twice tried. The judgment of conviction at the first trial was reversed by this court (163 N. Y. 11). At the second trial a judgment of conviction was entered upon the verdict of a jury, which, on appeal, was affirmed by the Appellate Division, and we are now called upon to pass on that determination.

The learned counsel for the defendant presents three grounds for the reversal of this judgment: Error in challenging the jury; failure of the trial judge to follow the decision of this court on the first appeal in charging the jury; the admission of the testimony of Dr. Brooks, who was dead at the time of the second trial.

The Appellate Division decided that none of these grounds presented reversible error, and we are of the same opinion, but deem it proper to further consider the question whether Dr. Brooks' testimony was properly read on the second trial.

The Code of Criminal Procedure (§ 8, subd. 3) provides that in a criminal action the defendant is entitled "To produce witnesses in his behalf, and to be confronted with the witnesses against him in the presence of the court, except that where the charge has been preliminarily examined before a magistrate, and the testimony reduced by him to the form of a deposition in the presence of the defendant, who has, either in person or by counsel, cross-examined, or had an opportunity to cross-examine, the witness, * * * the deposition of the witness may be read upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found in the state."

There seems to be no provision of the Code of Criminal Procedure authorizing, in terms, the reading on a second trial of the testimony of a deceased witness sworn at the first trial.

The Code of Civil Procedure (§ 830) provides as follows: "Where a party or a witness has died * * * since the trial of the action, * * * the testimony of the decedent, * * * taken or read in evidence at the former trial or hearing, may be given or read in evidence at a new trial or hearing, or upon any subsequent trial or hearing, of the same

subject-matter in an action * * * between the same parties who were parties to such former trial or hearing or their legal representatives, by either party to such new trial or hearing or to such subsequent action, * * * subject to any other legal objection to the competency of the witness, or to any other legal objection to his testimony or any question put to him. The original stenographic notes of such testimony taken by a stenographer, who has since died or become incompetent, may be so read in evidence by any person whose competency to read the same accurately is established to the satisfaction of the court, * * * presiding at the trial of such action. * * *

The section quoted refers to the death of a witness after the trial of an "action."

Section 3333 of the Code of Civil Procedure defines "action" as follows: "The word 'action,' as used in the New Revision of the Statutes, when applied to judicial proceedings, signifies an ordinary prosecution, in a court of justice, by a party against another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense."

This definition renders it clear that section 830 of the Code of Civil Procedure, above quoted, refers to both civil and criminal actions.

Section 8 of the Code of Criminal Procedure provides that the defendant shall be confronted with the witnesses against him in the presence of the court. This is merely a re-enactment of the Bill of Rights, which provides in section 14 that the accused shall be confronted with the witnesses against him. (2 R. S. [Banks' ed.] 1561.)

The Constitution of this state, unlike the Federal Constitution, has no similar provision.

The question has been much discussed whether the reading of testimony, reduced to a deposition in a preliminary examination, where the accused was represented by counsel and exercised the right of cross-examination, or testimony taken at a former trial, where the deponent or witness was dead at

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

the time of the subsequent trial, could be read in evidence. It has also been matter of discussion whether the precise testimony taken at a former trial should be read in evidence from the minutes, or, in case of their destruction, the substance thereof given by a witness who heard the testimony delivered at the first trial.

In the case of *People v. Williams* (35 Hun, 516) the question of the constitutionality of section eight, subdivision three, of the Code of Criminal Procedure was under consideration. Judge DANIELS said (p. 518): "It is manifest from the authorities permitting the deposition or evidence of a deceased witness to be read upon a trial of the accused, that it has not been deemed essential that he should be confronted by the witness against him upon the trial itself; but if the evidence be taken in the course of the proceeding in his presence, and with the right or privilege of cross-examination secured to him, that will be sufficient to allow the deposition to be read, in case of the decease of the witness making it, between the time when it may be taken and the time of the trial. And if this article of the Constitution should be held to be applicable to the case, it would not, therefore, exclude the deposition received in evidence on the trial of the defendant."

The Constitution here referred to is the Federal Constitution, for, as already observed, the State Constitution has no provision for the right of confrontation.

In *People v. Penhollow* (42 Hun, 103) it appeared that a witness on the part of the People, at the first trial of this indictment, was dead at the time of the second trial, and the district attorney offered to read in evidence her testimony as previously given. To the reception of this proof the defendant objected, on the ground that it was incompetent and unconstitutional, being in violation of the sixth article of the amendments of the Constitution of the United States, which provide that in all criminal prosecutions the accused shall be confronted with the witnesses against him.

The court said (p. 105): "This provision has no application to criminal trials in the state courts for a violation of

state laws. This right, secured to the accused, is limited in its application to citizens of the United States on trial in the federal courts, charged with a violation of the Constitution of the United States, or of the laws of Congress. * * * Our own state Constitution does not contain any provision securing to the accused the right and privilege of being confronted by the witnesses against him. In the Bill of Rights, adopted by the legislature, there is a provision similar to the one embraced in the Constitution of the United States and expressed in the identical words." The learned judge here quotes section fourteen of the Bill of Rights, and proceeds as follows: "The accused was confronted by the witness on the former trial, and he had an opportunity of making a cross-examination, and that satisfies the requirements of the statutes. The right secured to the accused, it is to be observed, is 'to be confronted with the witnesses against him.' This language does not require that the accused shall, in all cases, be confronted with the witnesses against him upon a pending trial of the indictment. The courts have held that the statute is satisfied, in cases of necessity, if the accused has been once confronted by the witness against him in any stage of the proceedings upon the same accusation, and has had an opportunity of a cross-examination, by himself or by counsel, in his behalf."

In *Brown v. Commonwealth* (73 Penn. St. 321) the question was considered whether the testimony taken by the commonwealth, on a hearing before a justice of the peace, of a person charged with murder, was admissible on the trial. Chief Justice READ, in a very careful and able opinion, considered the question at some length, citing many authorities, and reached the conclusion that the testimony was admissible.

A like question was before the court in *Commonwealth v. Richards* (35 Mass. [18 Pickering] 434). The learned court said: "It has been contended for the defendant that the admission of such evidence is directly against the twelfth article of the Bill of Rights, which provides that in criminal cases the subject shall have a right 'to meet the witness

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

against him, face to face.' Now, the defendant did meet the witness who has deceased, face to face, and might have cross-examined him before the magistrate touching this accusation. * * * We think it to be very clear that testimony of what a deceased witness did testify on a former trial, between the same parties on the same issue, is competent evidence. The rule is thus well stated in 2 Lilly's Abr. 745: 'If one who gave evidence on a former trial be dead, then, upon proof of his death, any person who heard him give evidence and observed it shall be admitted to give the same evidence as the deceased witness gave, provided it were between the same parties.' I cite the passage for the expression 'shall be permitted to give the same evidence' which the deceased gave. It is to be the same, not a part, not the effect or substance, but the whole evidence, which the deceased witness gave, touching the matter or issue in controversy. (1 Phil. Evid. Chap. 7, § 7; *Miles v. O'Hara*, 4 Binney, 111; *Pyke v. Crouch*, 1 Lrd. Raym. 730; *Melvin v. Whiting*, 7 Pick. 79; Bull N. P. 242, *et seq.*)"

In *People v. Newman* (5 Hill, 295) the Supreme Court of this state held that in a criminal action the public prosecutor will not be allowed to use the testimony given by the witness at a former trial of the same indictment though he be absent from the state. It is stated in a *per curiam* opinion as follows: "It seems to be settled in this court that nothing short of the witness's death can be received to let in his testimony given on a former trial. (*Powell v. Waters*, 17 Johns. 176; *Wilbur v. Selden*, 6 Cow. 162; and see *Jackson v. Bailey*, 2 Johns. 17; *Beals v. Guernsey*, 8 Johns. 446; *White v. Kibling*, 11 Johns. 128; *Crary v. Sprague*, 12 Wend. 41, 44, 45.) But if the rule were otherwise in respect to civil cases, we are of opinion that it should not be applied to criminal proceedings. * * * It is not now necessary, however, to decide that point, the present case being one of mere absence from the territorial jurisdiction of the court."

In the case of *United States v. Macomb* (5 McLean 286) the Circuit Court of the United States, 7th Circuit, held that

where, at the preliminary examination, a witness since deceased testified in relation to the offense, the accused being present and his counsel accorded the right of cross-examination, that on a trial before a jury, under an indictment for the same offense, witnesses might be permitted to testify as to what the deceased swore to on the preliminary examination. Judge DRUMMOND in that case made an exhaustive examination of the authorities and reasons the question on principle at length.

Mr. Underhill, in his work on Criminal Evidence (§ 261), says: "In criminal as in civil procedure, the evidence of a witness at a prior trial may be proved as evidence in a subsequent trial of the accused for the same offense if the witness is dead or has become incompetent by reason of mental derangement. His testimony is admissible either for or against the party in whose favor he originally testified. (*State v. Taylor*, Phil. [N. Car.] 508, 513; *Hair v. State*, 16 Neb. 601, 605; *State v. McNeil*, 33 La. An. 1332; *O'Brian v. Com.*, 6 Bush [Ky.], 563, 571; *State v. Johnson*, 12 Nev. 121, 123; *State v. Able*, 65 Mo. 357; *Sullivan v. State*, 6 Tex. App. 319.)"

In Greenleaf on Evidence (Vol. 1 [16th ed.], § 163g) this language is used: "The death of the witness has always and of course been considered as sufficient to allow the use of his former testimony." Citing a number of cases in England and several states of the Union. (See, also, Abbott's Trial Brief Criminal Cases, § 664, and cases cited; Cowen & Hill's notes on Phillips' Evidence, vol. 1, p. 571, note 437, and p. 578, note 442.)

It seems to have been the universal rule that the evidence of a deceased witness could be read on the second trial in civil cases. It has been debated to some extent whether the rule should be extended to criminal trials. It is safe to say that the great weight of authority is in favor of such extension. The object of all trials, civil and criminal, is to arrive at the truth and do justice, and it would certainly tend to an opposite result if testimony carefully taken upon a former trial, at which the accused was represented by counsel, who

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

was permitted the right of cross-examination, is to be excluded by the mere accident of the death of the witness, which is liable to occur in all prolonged litigations.

In this state the discussion of the question seems to have been confined to the lower courts, and mainly in the earlier cases.

There is little doubt that the practice in civil cases in this regard has been adopted by the criminal courts as matter of course, which accounts for the fact that the question has not been presented to this court, so far as we are advised.

The legislature in enacting section 830 of the Code of Civil Procedure, already quoted, evidently sought to codify what was an existing general rule in both civil and criminal cases. If this legislation could properly be regarded as violating the right of confrontment, as contained in the Bill of Rights, it would amount only to a modification of the rule as laid down in the former legislation. There is, however, no ground for such criticism, as it is very clear that the right of confrontment has been carefully guarded in this and other states by only admitting such testimony or depositions as were taken in the presence of the accused, represented by counsel, exercising the full right of cross-examination.

While unable to find reversible legal error in this record, we feel constrained to repeat what we said on the first appeal (163 N. Y. 12), that "in a case like the one before us, where the indictment charges a heinous and unnatural offense, it is most difficult to secure an absolutely fair trial."

There are features of this case, common to both trials, where evidence was procured for the People at the fearful cost of a mother voluntarily subjecting a mere child to the alleged repetition of an unthinkable and horrible offense by the father. This is a phase of the case we do not feel justified in passing over without comment. It was an unconscionable and brutal act on the part of the child's mother, in seeking to secure her husband's conviction, by resorting to a mode of procedure that shocks the moral sense of every right-thinking person.

The case of the People is subjected to the gravest suspicions under the circumstances.

The judgment of conviction should be affirmed.

PARKER, Ch. J., O'BRIEN, MARTIN, VANN, CULLEN, JJ.
(and GRAY, J., in result), concur.

Judgment affirmed.

AUGUST UIHLEIN et al., Respondents, v. MARGARET MATTHEWS,
Appellant, Impleaded with Others.

EVIDENCE—RESTRICTION AS TO USE OF PREMISES FOR A SALOON WHEN REMOVED BY QUITCLAIM DEED—ACTS AND CONVERSATIONS OF PARTIES INADMISSIBLE TO CONTRADICT DEED. Where the owner of a building by an instrument in writing conveyed three inches of land with the right to use his party wall to an adjoining owner in consideration of a covenant by the latter, stipulated to run with the land, that she would not during a specified time use a building to be erected by her for a saloon, and a dispute having arisen as to the title to a portion of her lot, the grantor, for a consideration, subsequently executed and delivered to her a quitclaim deed of her entire lot, including that portion in dispute, with no reservation or exception whatever as to the restriction, the effect of the deed is to annul it, and evidence of the acts and conversations of the parties prior to the delivery of the quitclaim deed, in order to show that it was not intended thereby to release or affect the restriction, is inadmissible.

Uihlein v. Matthews, 57 App. Div. 476, reversed.

(Argued June 19, 1902; decided October 7, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 1, 1901, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

George E. Milliman for appellant. It was error to admit parol evidence of what preceded the giving of the deed and

N. Y. Rep.]

Opinion of the Court, per O'BRIEN, J.

of the intention of the parties. (*McCluskey v. Cromwell*, 11 N. Y. 593; *Thomas v. Scutt*, 127 N. Y. 133; *Money Penny v. Money Penny*, 9 Hoff. 146; *Devlin on Deeds*, 837; *Holmes v. Hall*, 8 Mich. 66; *Brunhild v. Freeman*, 77 N. C. 128; *Green v. Collins*, 86 N. Y. 246; *Bates v. Virolet*, 33 App. Div. 436.) The deed and the contract released the land of the appellant from the restrictions relating to the sale of liquor contained in the contract of May fourth, and that contract was not reaffirmed by the reference contained in the agreement of November seventh. (*Jones on Real Property*, § 209; 9 Am. & Eng. Ency. of Law [2d ed.], 105; 20 Am. & Eng. Ency. of Law [1st ed.], 735; 10 Am. & Eng. Ency. of Law [2d ed.], 432; *Hamilton v. Farrar*, 128 Mass. 492; *Sidwell v. Greig*, 17 Misc. Rep. 165; *Bradley v. Walker*, 138 N. Y. 291; *Flatten v. Morehead City*, 58 Minn. 324; *Bradley v. Spruck*, 27 Ill. 478; *Morgan v. Clayton*, 61 Ill. 35; *Short v. Van Dyke*, 50 Minn. 286; *Hopkins v. Rogers*, 3 Yerg. 457; *Riley v. City of Brooklyn*, 46 N. Y. 444; *House v. Walch*, 144 N. Y. 418.)

Scott Cummings for respondents. The defendants were bound by the covenant in the contract which has never been released. (*Bradley v. Walker*, 138 N. Y. 291; *Snow v. Tift*, 15 Johns. 458; *Craig v. Wills*, 11 N. Y. 315; 2 *Devlin on Deeds*, § 856.) The parol evidence was properly received. (*Gerard on Titles*, 303; *Coleman v. Brock*, 97 N. Y. 545; *Jones on Real Property*, § 744.)

O'BRIEN, J. The judgment in this action awarded a permanent injunction against the defendant, restraining her from using or permitting the use of her premises as a place for the sale of ales, beers, wines and liquors, for the period of five years from May 4, 1895. The facts upon which the judgment rests were found by the trial court and appear fully in the record without dispute, and, hence, the appeal presents the question whether the judgment is sustained by the conceded and undisputed facts. The defendant owns a block or

building adjoining the plaintiffs. The premises of the latter are occupied as a saloon kept by the plaintiff McManus as the tenant of his co-plaintiff. He formerly owned the premises so occupied by him, as well as the land upon which the defendant's building now stands, but a short time before the commencement of this action he conveyed the premises where his saloon now is to his co-plaintiff, continuing, however, the saloon business at the same place under a lease from Uihlein. The defendant having recently erected a building upon her lot adjoining the plaintiffs' leased it to be used as a saloon or place for the sale of ales and liquors. The courts below have enjoined such use of the defendant's premises as in violation of a covenant on her part with McManus. This judgment is in accordance with the theory of the action and the prayer of the plaintiffs' complaint. The defendant contends that no such covenant existed or was in force at the time of the commencement of the action, and this contention involves the construction and legal effect of certain conveyances between the parties.

On the 4th day of May, 1898, the defendant being about to erect a building on her adjoining lot, agreed with McManus, who then owned the property now held by the plaintiffs, for the conveyance to her of three inches of land east of the line of his building for her party wall. On that day a written instrument was executed which conveyed the three inches to the defendant and it was duly recorded the next day. In this conveyance, which was also executed by the defendant, she covenanted and agreed with McManus, the grantor, that "she would not use or permit to be used the building to be erected by her upon her said property as a saloon and restaurant, or as a place for the sale of ales, beers, wines and liquors for the period of five years from the date of said instrument." The courts below have held that this was a valid restriction upon the use of the defendant's property, made upon an adequate consideration and binding upon her. If the restriction was not removed by the subsequent acts and conduct of the parties that conclusion would not be open to question.

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

The defendant having erected her building applied for a loan thereon, when it was found that there was included in her lot a strip of land about two and a half feet wide as to which there was some defect in regard to the title, and it is found that it became a matter of dispute as to whether the defendant or McManus had the title. The latter refused to settle the dispute by a release or otherwise for some time, and in the end exacted from the defendant \$125 for his claim, if any. On the 28th day of September, 1898, McManus and his wife executed and delivered to the defendant a quitclaim deed of her entire lot by metes and bounds, including the two and a half feet in dispute, whereby the grantor conveyed to the defendant the land "with all and singular the hereditaments and appurtenances thereto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim and demand whatsoever; of the said party of the first part, either in law or equity, of, in and to the above bargained premises, with the said hereditaments and appurtenances, to have and to hold the said described lands and premises to the said party of the second part, her heirs and assigns, to the sole and only proper benefit and behoof of the said party of the second part, her heirs and assigns forever." This deed was recorded on the 11th day of November, 1898. On the 7th day of November, 1898, the parties entered into another agreement which had all the effect of a conveyance and was recorded November 17th, 1898, but the only purpose of that instrument was to allow the defendant to extend her building and the west wall thereof about two feet beyond the front of plaintiffs' building or to the line of the street. It enlarged the defendant's rights, and in no respect did it restrict her in the use of her property. The two instruments conveying to the defendant the right to maintain her party wall expressly provided that the rights and covenants therein provided for should run with the land, and although nothing on that subject is mentioned in the quitclaim deed, yet, in the absence of some

words of limitation, that form of conveyance carries to the grantee the benefit of all covenants running with the land. (Devlin on Deeds, sec. 849; *Jenks v. Quinn*, 137 N. Y. 223; *Brady v. Spureck*, 27 Ill. 478; *Morgan v. Clayton*, 61 Ill. 35.)

It cannot be doubted that the agreement between the parties which contains the restriction in question created an easement in favor of the plaintiffs and their land and imposed a servitude upon the defendant's property. The right which the plaintiffs thus acquired to restrict the use of the defendant's property is sometimes called a negative easement, which is the right in the owner of the dominant tenement to restrict the owner of the servient tenement in the exercise of general and natural rights of property. (*Pitkin v. L. I. R. R. Co.*, 2 Barb. Ch. 221; *Day v. N. Y. C. R. R. Co.*, 31 Barb. 548; 2 Wash. on Real Prop. [5th ed.] 314.) The servitude thus imposed upon the defendant's property was in every legal sense an incumbrance and an interest in lands which could pass only by deed. (*Huyck v. Andrews*, 113 N. Y. 81.) The sole question in this case is whether this easement in favor of the plaintiffs and servitude upon the defendant could survive the broad terms of the plaintiffs' grant to the defendant, made several months after the servitude was imposed. That grant conveyed to the defendant every possible right, interest or claim that the grantor had or could assert against the premises, in law or equity. The plain legal effect of that deed was to release or annul the restriction in favor of the grantor against the property. The continued existence of the servitude would be inconsistent with the terms of the grant and contradictory of its entire scope and meaning, and so we think that upon the delivery of that deed the easement and servitude ceased to exist. It ceased to exist as to both of the plaintiffs since the deed from McManus to Uhlein was made subsequent to the time when the prior conveyances referred to had taken effect.

The plaintiffs were permitted, against the defendant's objection and exception, to prove the acts and conversation of the parties prior to the delivery of the quitclaim deed to the

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

defendant, in order to show that it was not intended by that conveyance to release or otherwise affect the restriction upon the use of defendant's property contained in the prior agreement in regard to the party wall. The precise question is whether a person who has an interest in the real property of his next neighbor in the nature of an easement, and who conveys absolutely, without any exception or reservation of such easement, can afterwards be permitted, in an action to enforce the right involved in the easement, to show by parol that he intended to retain it, notwithstanding his deed. We think that the testimony was inadmissible. The deed in terms, as we have seen, purported to convey all the right, title and interest of the grantor. The language employed necessarily included any easement that the grantor had or claimed with respect to the premises conveyed, and it was not competent to show by parol evidence that the easement was reserved or excepted. It was a violation of the rule which excludes such evidence to vary, explain or contradict a written instrument that was complete in itself and without ambiguity in its terms. The legal effect of the deed upon the prior easement was to be determined upon the words embodied in the conveyance, and not with reference to what the grantor thought or understood. When words have a definite and precise meaning, it is not permissible to go elsewhere in search of conjecture in order to restrict or extend the meaning. That deeds or other written instruments cannot be varied, enlarged or restricted by evidence of that character appears from the words of the statute and the general consensus of authority. (Chap. 547, Laws of 1896, sec. 205; *Armstrong v. Lake Champlain Granite Co.*, 147 N. Y. 495; *McCluskey v. Cromwell*, 11 N. Y. 601; *Green v. Collins*, 86 N. Y. 254; *Thomas v. Scutt*, 127 N. Y. 133-138; *Case v. Phoenix Bridge Co.*, 134 N. Y. 78; *Englehorn v. Reitlinger*, 122 N. Y. 76; *House v. Walch*, 144 N. Y. 418; Devlin on Deeds, sec. 837.) It follows that all parol evidence tending to show that, notwithstanding the clear and comprehensive words of the quitclaim deed, the grantor therein still retained the right to restrict the

grantee in the use of the property conveyed should have been excluded. If in consequence of fraud or mutual mistake the deed conveyed more than the parties intended it was subject to reformation in equity, but no facts have been found to justify any relief of that kind. This is an action projected upon the theory that the servitude imposed upon the defendant's property by the party wall agreement remained in force after the plaintiff had conveyed the premises. Moreover there is nothing in the record that tends to show that the defendant ever intended to pay to the plaintiff a considerable sum of money for a deed of all his interest in her property and at the same time leave an outstanding incumbrance in the grantor that affected her title. In the absence of clear proof to the contrary the natural and reasonable construction to be placed upon her acts and conduct would be that her intention was to procure a title clear and absolute, that she could mortgage or convey in the same way as she could if the restriction in question had never been imposed upon her land. This conclusion is not qualified or affected by the last or supplementary writing in regard to the party wall. That paper, as already observed, enlarged the defendant's rights by allowing her to extend her wall to the street line. The very fact that it did not impose any restriction or by any form of words attempt to revive what was extinguished by the deed tends rather to confirm than to weaken the general effect of that conveyance upon the easement as indicated in the principles herein stated.

The judgment should be reversed, and a new trial granted, costs to abide the event.

BARTLETT, J. (dissenting). I am of opinion that the Appellate Division reached a proper conclusion and that the judgment should be affirmed.

A clear statement of the facts is essential to an understanding of the questions presented by this appeal. For several years prior to the month of January, 1899, the plaintiff, McManus, owned the premises situate in the city of Rochester known as No. 161 West avenue, and occupied the same

N. Y. Rep.]

Dissenting opinion, per BARTLETT, J.

as a saloon and restaurant; West avenue runs east and west. These premises were eighteen feet wide and one hundred feet deep.

The defendant, Margaret Matthews, was the owner of a vacant lot fourteen feet in width and about one hundred feet in depth on the east side of and adjoining the premises of McManus.

The defendant Matthews, being desirous of erecting a brick building on her lot, entered into negotiations with McManus for the purchase from him of three inches of land included in his premises and east of the east wall of his building thereon; and also for the use of the east wall of the McManus building as a party wall; that thereafter and on the fourth day of May, 1898, pursuant to such negotiations, said agreement was entered into, and in consideration thereof the defendant Matthews covenanted and agreed with the plaintiff McManus that "she would not use or permit to be used the building to be erected by her upon her said property * * * as a saloon and restaurant, or as a place for the sale of ales, beers, wines and liquors, for the period of five years from the date of said instrument." It was further agreed that these covenants should run with the land.

There is no finding that McManus owned any land east of his east wall except the three inches here conveyed, and his testimony shows that he never made any claim that he did.

It is further found that after the defendant Matthews had erected her building she applied for a loan, and it was then discovered that within the bounds of her lot there was a strip of land about two and one-half feet in width and extending the length of the lot which was apparently not covered by her deeds, and it was a matter of dispute between herself and the plaintiff McManus as to the ownership thereof. (There is no claim that McManus was her original source of title.) That thereafter, and in the early part of November, 1898, McManus and wife, for the purpose of settling such controversy, for a valuable consideration, gave the defendant Matthews a quitclaim deed of all his interest in said land; that

contemporaneous with the delivery of such quitclaim deed, and as a part of the same transaction, McManus and defendant Matthews entered into a written contract recognizing and continuing the former contract made by them and dated the 4th day of May, 1898. This quitclaim deed is in evidence.

It is to be borne in mind that the total width of the Matthews lot was only fourteen feet, and yet this quitclaim deed purports to convey all the lands from the center of McManus' east wall to Julia street, a distance of about forty-four feet. The thirty feet east of the land that the defendant Matthews owned McManus never claimed to own, nor had he any title to the Matthews lot.

The real situation is clearly disclosed by the findings and the evidence. The defendant Matthews having applied for a loan, was advised that within the bounds of her lot there was a strip of land about two and one-half feet in width and extending the depth of it, which was apparently not covered by the deeds. Neither the findings nor the evidence locates this two and one-half feet strip, and it is evident that the searcher of the title had some difficulty, as is often the case, in locating the various lots west of Julia street on West avenue, including those of Matthews and McManus. In order to correct any difficulty regarding this unlocated strip of land, McManus, for a consideration, was induced to execute a quitclaim deed of all the land lying between his east line as bounded by the party wall and Julia street, although making no claim of title.

The findings and the evidence make it plain that the sole object of this quitclaim deed was to correct this alleged defect in Matthews' title.

It is expressly found that as a part of the same transaction, a written contract was executed between the parties continuing the former contract and conveyance of May 4th, 1898. These two contracts are in evidence, and the latter not only continued in force the agreement of May 4th, 1898, as stated, but provided that Matthews having erected a brick building upon her land, extending the west wall thereof about two feet

N. Y. Rep.] Dissenting opinion, per BARTLETT, J.

beyond the front wall of McManus' building to the line of the street, that the agreement of May 4th, 1898, should apply to the entire west wall as erected, and conferring upon each party the right to use the extension as a party wall.

McManus and wife, in January, 1899, conveyed to the plaintiff Uihleen who afterwards leased the premises to McManus, and the latter continued to conduct on the premises a saloon and restaurant. The defendants O'Hara and Murphy were copartners, and about the first of July, 1899, with knowledge of the covenant entered into by Matthews, in which she agreed not to use her building for the sale of liquors, etc., for the period of five years from May 4th, 1898, opened and conducted a saloon and restaurant upon the Matthews premises in alleged violation of this covenant.

This action seeks to enforce the covenant and restrain O'Hara and Murphy from conducting said business.

The complaint also prays for damages and for a reformation of the quitclaim deed, if it be found that the legal construction thereof was to render of no force or effect the covenant in the agreement and conveyance of May 4th, 1898.

While it is the general rule that deeds or other instruments cannot be varied, enlarged or restricted by parol evidence, yet there are many and well-established exceptions thereto. A familiar example is found in that power which has always been exercised by a court of equity to declare a conveyance which is absolute upon its face a mortgage.

In the first place, we have read into this quitclaim deed the agreement of May 4th, 1898, which includes the very covenant in question; also the subsequent agreement executed contemporaneously with the quitclaim deed, the two constituting one transaction.

It would seem to go without saying that a court of equity, under the undisputed facts here disclosed, has the power to examine all the written instruments and, in the light of their provisions and the testimony of the parties interested, determine the exact nature of this transaction and the effect of the various conveyances and contracts.

It is disclosed that during the negotiations resulting in the quitclaim deed it was not suggested that the execution and delivery of the latter had any other object than to correct the alleged cloud upon the defendant Matthews' title to the strip of land in question.

The appellant's contention that it was error to admit parol evidence of what preceded the giving of the quitclaim deed and of the intention of the parties ought not to be sustained.

In *Stow v. Tift* (15 Johns. 458) the general principle is laid down that where two instruments relating to the same subject are executed at the same time, they are to be taken in connection as forming parts of the same agreement.

It is expressly found that the defendants O'Hara and Murphy opened their saloon and restaurant upon the Matthews premises with full knowledge of this covenant in the agreement of May 4th, 1898.

In *Tallmadge v. East River Bank* (26 N. Y. 105) it is held that the owner of land may by parol contract, with the purchasers of successive parcels, in respect of the manner of its improvement and occupation, affect the remaining parcels with an equity requiring them also to be occupied in conformity to the general plan, which is binding upon a subsequent purchaser with notice of the fact, though his legal title be absolute and unrestricted.

In *Collins v. Tillou* (26 Conn. 368) it is held that the purpose of an ordinary deed of land is not to state the terms of the contract, in pursuance of which the land is conveyed, but to pass the title; and notwithstanding the formal statement of consideration, and of the receipt thereof contained in the deed, the grantor is at liberty to prove by parol evidence the real contract, in pursuance of which the deed was given.

In *Palmer v. Culbertson* (143 N. Y. 213) it was held competent to show by parol evidence that an absolute deed was intended as an advancement.

In the case at bar, the written instrument, bearing date May 4th, 1898, was a conveyance of three inches of land, a party wall agreement, and a covenant on the part of the

N. Y. Rep.]

Statement of case.

defendant Matthews not to use her premises for the period of five years as a place for the sale of liquors.

It has been held that an agreement which was a part of the consideration for the sale, restricting the use of the property, is not merged in the deed, and does not qualify or in any way affect the title to the land; and the admission of parol evidence to prove such an agreement is no infringement of the rule that parol evidence is not admissible to contradict, vary or explain a written instrument.

Evidence is admissible of a parol agreement that no part of the premises should be used for the sale of intoxicating liquors, and upon proof of the agreement the grantee shall be restrained from using the property for such purpose. (1 Jones' Law of Real Property, § 744, and cases cited.)

The case before us is of trifling importance, but the principle which will be established in the reversal of this judgment is far-reaching, and as I regard it opposed to the settled law of the state.

I vote for the affirmance of the judgment.

PARKER, Ch. J., GRAY and CULLEN, JJ., concur with O'BRIEN, J.; MARTIN and VANN, JJ., concur with BARTLETT, J. Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
DANIEL DOODY, Appellant.

1. **PERJURY.** The rule that prevails in cases of perjury, where one oath is placed against another, that there must be two witnesses to prove the charge, or in case only one witness is produced there must be independent corroborating circumstances, has no application where the proof of the crime is necessarily based upon circumstantial evidence.

2. **WITNESS — WHEN DENIAL OF RECOLLECTION AS TO MATERIAL FACTS CONSTITUTES PERJURY.** A witness who swears falsely, willfully and corruptly to the effect that he does not remember certain material facts involved in the issue on trial, when it is shown by competent proof that he did remember them, is properly convicted of the crime of perjury.

3. WHEN EVIDENCE TENDING TO ESTABLISH THE FALSITY OF HIS DENIAL IS NOT INCOMPETENT AS TENDING TO PROVE OTHER OFFENSES—ADMISSIBILITY OF EVIDENCE AS TO THE PROBABILITY OF THE TRUTH OF HIS DENIAL. The previous statements and admissions of one on trial for perjury in falsely swearing that he did not remember material facts involved in an issue on trial, by which he accused himself and others of conspiracy and the commission of a crime, are not inadmissible as tending to prove the commission by him of another offense when the sole purpose of such testimony is to establish the fact that he did remember them; nor are indictments against his confederates based upon such statements inadmissible since they are competent as to the probability of the witness' forgetting events which produced such startling results.

4. WHEN DEFENSE OF IRRESPONSIBILITY FOR DENIAL OF RECOLLECTION IS A QUESTION OF FACT. The truth or falsehood of a defense, that the defendant, at the time he testified he did not remember, was and had been suffering from paresis which paralyzed his memory to such an extent that he could not be held responsible for his answers, is a question of fact for the jury and its determination against him if made upon sufficient evidence will not be disturbed upon appeal.

5. LATITUDE ALLOWED THE DISTRICT ATTORNEY IN DISCUSSING A CRIMINAL CASE. Upon a criminal trial the district attorney is entitled to discuss before the jury all the facts and circumstances bearing upon the issue and within the scope of the evidence with the same freedom of speech that is to be awarded to counsel in any case.

People v. Doody, 72 App. Div. 372, affirmed.

(Argued June 27, 1902; decided October 7, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered June 10, 1902, which affirmed a judgment of the Kings County Court rendered upon a verdict convicting the defendant of the crime of perjury.

The facts, so far as material, are stated in the opinion.

Jerry A. Wernberg for appellant. The crime stated in the indictment has not been proven. (Code Crim. Pro. §§ 393, 395; *People v. Kelly*, 3 N. Y. Cr. Rep. 414; *People v. Jaehne*, 103 N. Y. 182; 4 N. Y. Cr. Rep. 479; 3 N. Y. S. R. 11; *U. S. v. Mayor*, 1 Deady, 127; *Commonwealth v. Grant*, 116 Mass. 17; *State v. Schultz*, 57 Ind. 19; *State v. Norris*,

9 N. H. 96; *Jacobs v. Feiler*, 3 Hill, 572; 2 Bish. Cr. L. § 1015; *Commonwealth v. Smith*, 11 Allen, 243; *Commonwealth v. Pollard*, 12 Metc. 225; 3 Greenl. on Ev. § 188; 2 Whart. Cr. Law [8th ed.], 1276; *Regina v. Owen*, 6 Cox C. C. 105.) Prejudicial error was committed in the opening address before the jury, and for such error this conviction must be reversed. (*People v. Fielding*, 158 N. Y. 552; *People v. Milks*, 55 App. Div. 372; *People v. Smith*, 162 N. Y. 531; *People v. Greenwall*, 115 N. Y. 520; *People v. Mull*, 167 N. Y. 255.) The admission of the testimony proving crimes alleged to have been committed other than the one charged in the indictment was prejudicial error. (*People v. McLaughlin*, 150 N. Y. 391; *People v. Greenwall*, 108 N. Y. 296; *People v. Sharp*, 107 N. Y. 429; *People v. Molineux*, 168 N. Y. 264.) Assuming that the testimony of defendant before the grand jury as to his conversations with Fielding was competent upon this trial upon the question whether he did or did not remember them upon Fielding's trial, the evidence should have been limited to that. His statements before that body concerning his connection with other crimes were inadmissible for any proper purpose. (*People v. Bushnell*, 105 N. Y. S. R. 253; *People v. Milks*, 55 App. Div. 375; *Ormsby v. People*, 56 N. Y. 472; *People v. Sharp*, 107 N. Y. 426; *People v. Reif*, 58 Hun, 337; 126 N. Y. 661; *People v. McQuade*, 110 N. Y. 284; *Logan v. U. S.*, 144 U. S. 263; 3 Greenl. on Ev. [13th ed.] 32-94; 2 Whart. on Ev. 1205-1206.) The admission in evidence of the indictments against Willis and Phillips, the first indictment against Fielding, Knapp, Milne, Clark, Goff, Jensen and Leaycraft, and the conviction of some of the parties charged in these indictments was prejudicial error and sufficient ground for reversal of this conviction. (*Krober v. Miller*, 38 Hun, 184.) The admission of the comment or criticism of Mr. Justice SMITH upon the attitude of Doody as a witness upon the trial of Fielding when the alleged perjury by Doody was committed to be stated to the jury was prejudicial error. (*People v. Hill*, 37 App. Div. 327; *People v.*

Kennedy, 164 N. Y. 449; *People v. Brow*, 90 Hun, 512; *People v. Corey*, 157 N. Y. 332; *People v. Webster*, 59 N. Y. 398; *People v. Bissert*, 71 App. Div. 126.)

John F. Clarke, District Attorney (Martin W. Littleton of counsel), for respondent. The defendant Daniel Doody willfully and knowingly testified falsely in a material matter and testified a material matter to be true which he knew to be false. (*Wood v. People*, 59 N. Y. 121; *Comm. v. Pollard*, 12 Mass. 220; 3 Greenl. on Ev. [2d ed.] 197; Roscoe on Crim. Ev. 759, 814; *People v. Courtney*, 94 N. Y. 490; *People v. Bovry*, 63 Cal. 62; *State v. Mooney*, 65 Mo. 494; *Simpkins v. Malatt*, 9 Ind. 543; *Rode v. Lainthain*, 8 Blackf. 413; *Comm. v. Cornish*, 6 Binny, 249; *Comm. v. Grant*, 116 Mass. 17.) The evidence assigned as perjury in the indictment and proven upon the trial was material to the issue in that the sworn statement of the witness Doody, defendant herein, that he did not remember having furnished dummies and paid bribes to Fielding was willfully and corruptly designed and falsely made by him to destroy his credibility in the estimate of the jury, and said willful, corrupt and false statement did destroy his credibility as a witness. (*People v. Courtney*, 94 N. Y. 490; *Wood v. People*, 59 N. Y. 121.) The evidence given by the defendant Doody before the grand jury and on the subsequent trial of Fielding, Willis and Phillips, and his statements made to the district attorney, were admissible. (*People v. Wood*, 59 N. Y. 121; *Waterman v. Whitney*, 11 N. Y. 157.) It is not necessary in order to convict of perjury to produce two witnesses or one witness supported by corroborating and independent circumstances. It is only in cases in which oral evidence is relied upon to convict that this rule applies. It is otherwise in a case of circumstantial evidence. (*U. S. v. Wood*, 14 Pet. 430.) It was not error to read to the jury the remark made by Mr. Justice SMITH upon the last trial of Fielding, and while the defendant was a witness upon the stand. (*People v. Hill*, 37 App. Div. 327; *People v. Kennedy*, 164 N. Y. 449; *People v. Brow*,

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

90 Hun, 512; *People v. Corey*, 157 N. Y. 332; *People v. Webster*, 59 N. Y. 398.)

O'BRIEN, J. The defendant was convicted of the crime of perjury and the judgment of conviction has been affirmed in the court below after what appears to be a thorough discussion of the questions involved. These questions and the facts out of which they arise are so fully set forth in the report of the case below that it is not necessary to repeat the statement here. (72 App. Div. 372.) It will be quite sufficient for every purpose of a review in this court to refer to the facts in a general way.

The charge against the defendant which is set forth in the indictment is that he was called and sworn as a witness on the part of the People in a criminal case on the 19th day of December, 1899, and as such witness on the trial of the case he committed willful and corrupt perjury. The charge is based upon the testimony of the defendant as a witness in the case to the effect that he did not remember certain facts which were material and necessary for the People to prove upon the trial, and which it is alleged were well known to the defendant. The case is peculiar and exceptional in this respect, that the defendant was not charged with swearing falsely with respect to any affirmative or negative fact, but in swearing falsely that he knew nothing about them one way or the other, or to use his own words when examined as a witness, that he did not remember. The indictment alleges, and the record discloses in great detail, the transactions which finally culminated in the defendant's conviction. On the 14th day of March, 1898, he appeared before the grand jury of Kings county, and then and there testified to certain corrupt and criminal transactions on his part with certain public officers of the city of Brooklyn, whereby they were to award certain contracts for public work to persons to be named by him and who were to act in his interest, and that he should divide with these officers certain fixed percentages of the money to be paid on these contracts by the city; that these corrupt and

fraudulent agreements between the defendant and these city officers were completely executed. The contracts were awarded to the persons representing the defendant and the officers were paid the share of the proceeds stipulated. It is not necessary to describe this corrupt arrangement with greater particularity. It is enough to say that the defendant, as he then stated to the grand jury, conspired with various city officers to plunder the city by means of fraudulent and corrupt contracts for public works in the city.

It is important, however, to note the leading and fundamental feature of this transaction. It was impossible to carry the scheme into successful operation without the active aid and co-operation of the several city officers in the different departments. These departments, which were intended by the charter to be checks upon each other, were not only neutralized, but by means of bribery made active participants in the conspiracy to defraud the city. Each officer was to act a designated part in the consummation of a common scheme of fraud, and hence it was impossible to view the act of any one of them in the performance of his part without revealing the details of the conspiracy as a whole, since if any one of the conspirators failed to act his part the scheme could not be carried into effect. Therefore, in every investigation concerning the acts and conduct of these several city officers, or the acts of any one of them, it became necessary to describe the whole transaction in order to show what the real scope and purpose of the scheme was and the legal responsibility of each and all of the actors therein. The whole scheme was fully revealed by the defendant in his testimony before the grand jury, and the result was that indictments were found against nine of these city officers, in which they were charged with various offenses.

On the 16th of May, 1898, the indictment against Robert W. Fielding, the deputy commissioner of the city works, was brought to trial and the defendant was sworn as a witness by the prosecution, and again testified substantially to the same facts that he had testified to before the grand jury, and the

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

trial resulted in a conviction. Subsequently, and on April 24, 1899, some of the other city officers were brought to trial, and again the defendant was the principal witness, and revealed all the details of the corrupt and fraudulent conspiracy already described. So far the defendant's attitude was that of an informer against his confederates in crime. But about the time of the last trial referred to an event occurred which seems to have had some influence upon his mind and revealed a desire upon his part to change his position. The judgment of conviction against Fielding was reversed in this court and a new trial granted, not upon the merits, but upon certain exceptions taken at the trial which related entirely to the argument of the case before the jury by the district attorney. (158 N. Y. 542.) The defendant expressed great satisfaction at this result and stated openly that he was sorry to see him convicted. On the 19th day of December, 1899, Fielding was again brought to trial. While the district attorney was preparing for the trial he sent for and had an interview with the defendant, who all along had been his principal witness and was to be his principal witness on the new trial. The district attorney called the defendant's attention to an interview between them, when the new trial was granted by this court, wherein the defendant expressed great delight at Fielding's success. He told the defendant that he knew he sympathized with the defense, but he would have to go upon the stand and testify to the facts, and proposed to refresh his memory by reading to him from printed records what he had sworn to on the several previous trials. The defendant said he would be glad to have the testimony read to him, and the district attorney then proceeded to read it, asking the defendant after the reading if it was correct and as he then recollected it, to which the defendant replied that it was. Only two or three days after this interview the district attorney called the defendant as a witness to prove the facts upon the new trial to which he had testified on the former trial and before the grand jury, as well as upon the trial of the other officers engaged in the con-

spiracy. He propounded to him questions in various forms intended to establish the facts charged in the indictment and to which the defendant had so often testified before, and to all these questions the defendant answered that he did not remember, and in this case these answers have been made the basis of the charge of perjury of which the defendant has been convicted. The prosecution broke down and the trial resulted in Fielding's acquittal.

[In order to sustain the charge of willful and corrupt perjury against the defendant the prosecution was bound to prove to the satisfaction of the jury that the defendant did remember that he had made the corrupt and fraudulent agreement with Fielding, whereby the latter was to award contracts to the persons designated by the defendant, and had paid to him his share of the proceeds or the designated percentage of the contract price. It was competent for the People to sustain that issue by circumstantial evidence. The rule that prevails in cases of perjury, where one oath is placed against another, that there must be two witnesses to prove the charge, or in case only one witness is produced, there must be independent corroborating circumstances, has no application to this case. There was no witness produced upon this trial who could swear that the defendant knew and remembered the facts which were the subject of inquiry. That issue had to be determined upon circumstantial proof. The question for the jury was whether it was true, as the defendant pretended, that in the space of a few days his mind had become a perfect blank with respect to the facts which the questions called for. He had testified to them all before the grand jury, and on the former trial and on other trials only a very brief time before he was examined. Moreover, they were all brought to his attention two or three days before he was called as a witness by the district attorney when his former testimony was read to him from the records of these trials and which he then pronounced correct. The jury could determine from all this whether the defendant told the truth when he said that he did not remember any of the facts embraced

N. Y. Rep.]

Opinion of the Court, per O'BRIEN, J.

in the questions, or whether on that occasion his answers were willfully and corruptly false. It is hardly necessary to add that the verdict upon this question of fact is well sustained by the evidence.

We have no doubt that a charge of perjury may be based upon the testimony of a witness upon a judicial trial who has sworn that he did not remember the facts material to the inquiry, if it be shown by competent proof that he did remember them. It may be difficult to prove the charge in many cases, but in this case there was no lack of proof. A witness may commit perjury by falsely stating what he thought or what he did or did not remember, or what his opinion is when these matters become material to the issue. It may be difficult to prove that his thought or his memory or his opinion was otherwise, but that difficulty has been successfully met and overcome in this case.] (*Regina v. Schlesinger*, 10 Ad. & El. [N. R.] 670; *People v. Robertson*, 3 Wheeler's Cr. Cas. 183; *State v. Henderson*, 90 Ind. 408; *State v. Terry*, 30 Mo. 368; *State v. Knox*, 61 N. C. 312; *Com. v. Grant*, 116 Mass. 17; *Com. v. Brady*, 5 Gray, 78; *Wilson v. Nations*, 5 Yerger, 211; *People v. Courtney*, 94 N. Y. 490; Bishop's Crim. Law, sec. 878; 3 Greenleaf's Ev. 197; Roscoe's Cr. Ev. 759, 814.)

The general doctrine to be found in these authorities warrants the conclusion that a witness who swears falsely, willfully and corruptly to the effect that he does not remember certain material facts involved in the issue on trial, when in truth they are within his knowledge and recollection, is guilty of perjury.

One or two questions of law arising upon exceptions taken at the trial have been argued by defendant's counsel. It is claimed that the prosecution were permitted to prove at the trial that the defendant had committed other offenses than the one for which he was on trial. In a literal sense that may be true, but it is not true within the meaning of the rule of law that excludes proof of other crimes where a party is being tried for a specific offense. (*People v. Molineux*, 168 N. Y.

264.) The only offense of which the defendant was charged was perjury, and in order to prove that charge the prosecution had to put in evidence what the defendant had repeatedly sworn to on previous trials and investigations to the effect that he had bribed several of the city officers. This testimony was not offered or admitted for the purpose of proving other offenses, but for the purpose of establishing the fact that he remembered and knew certain things which he swore that he did not remember or know. The previous statements and admissions of the defendant were admissible to prove that in stating that he did not remember certain things he testified falsely. The fact that the defendant in these statements, admissions and declarations accused himself of being a party to the conspiracy to defraud the city did not change the nature or character of the proof which his previous acts and conduct furnished with respect to the truth of his statement that he did not remember these facts when called as an unwilling witness. Everything that the defendant had sworn to or stated previously to the last trial of Fielding was admissible to show that he remembered the facts when he testified that he did not. The defendant was an informer upon his confederates and as such he made confessions that not only involved them but himself as well, but they were none the less admissible to prove that he knew the facts confessed as well upon the last trial as upon the first.

The district attorney in his argument to the jury referred to all the details of the conspiracy as disclosed by the defendant in his testimony on the previous trials and before the grand jury. It was all pertinent to the issue in this case which was whether the defendant knew and remembered the facts which were first brought to light through his own action. He did not accuse the defendant of any crime not embraced in his own confessions made repeatedly under oath. The general scheme in all its details could be legitimately discussed upon the trial of an issue which involved the question whether the defendant remembered it when called as a witness. In the trial of a criminal case the district attorney is

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

entitled to discuss before the jury all the facts and circumstances bearing upon the issue with the same freedom that is to be awarded to counsel in any case. He may not attempt to inject into the case facts or circumstances foreign to the issue or not within the scope of the evidence, but subject to these restrictions he is entitled to argue the case with the same freedom of speech that the courts concede to counsel generally in the trial of issues of fact before juries. "The jury system would fail much more frequently than it now does if freedom of advocacy should be unduly hampered and counsel should be prevented from exercising within the four corners of the evidence the widest latitude by way of comment, denunciation or appeal in advocating his cause." (Per ANDREWS, J., in *Williams v. Brooklyn El. Railroad Co.*, 126 N. Y. 102-3.) The several indictments against the city officers found upon the testimony of the defendant were properly admitted in evidence. The jury could not fairly judge with respect to the attitude of the defendant when he testified that he did not remember the facts involved in the questions propounded, without full information as to his attitude in the past. They were entitled to know all that he had done and accomplished in bringing his confederates to justice in order to determine whether it was true in fact that he did not remember the events which produced such startling results to himself and his associates, and if he still knew and remembered these facts then to determine his real motives in swearing that he did not. The indictments were the necessary result and outcome of the defendant's mental resolution to make full disclosure of the conspiracy against the city and they were the basis of all the legal proceedings that subsequently took place in which the defendant participated as the principal witness. The history of the conspiracy in all of its details was necessary in order to give the jury a full and complete view of the defendant's attitude down to the time when he claimed that he had no memory concerning these multifarious and complicated transactions, and the indictments and trials constituted important chapters in that history.

The real defense interposed in behalf of the defendant to the charge of willful and corrupt perjury, and which occupies such a prominent place in the record, was that at the time when the testimony was given, now charged to be false, he was and had for some time been suffering from paresis or some similar mental disease that paralyzed his memory to such an extent that he could not be held responsible for his answers to the questions propounded to him upon the trial. It is not necessary in this court to say much in regard to that defense. It is quite sufficient to observe that it presented a question of fact that was fully and fairly tried before the jury. The evidence bearing upon it, consisting in part of the opinions of experts, was submitted to the jury, and the verdict must be regarded as the fair and deliberate judgment of the body which, under our system of jurisprudence, is organized to determine matters of fact, that it was without merit. Of course it is possible that a person may be suddenly afflicted with a mental disease that completely prostrates all of his intellectual faculties, but whether that claim was true or false in this case was a question for the jury. When the evidence bearing upon that issue, direct and circumstantial, is fairly considered the conclusion of the jury is not open to question. We think that the record presents no question that would warrant this court in interfering with the judgment, and so it must be affirmed.

PARKER, Ch. J., BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ., concur.

Judgment of conviction affirmed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. CHARLES E. CORKRAN, Appellant, v. JAMES L. HYATT, as Chief of Police of the City of Albany, Respondent.

1. EXTRADITION — CONSTITUTIONAL LAW — COMITY. The extradition from one state to another of a fugitive from justice does not depend on comity or contract, but on the provisions of the Constitution of the United States.

N. Y. Rep.]

Statement of case.

2. **FUGITIVE FROM JUSTICE — PRESENCE IN DEMANDING STATE.** The constructive presence in the demanding state at the time of the commission of the alleged crime is not sufficient to make the alleged offender a fugitive from justice or extraditable as such, but his actual presence therein at such time is necessary.

3. **SAME.** That one not personally present in a state at the date of the commission of the alleged crime of larceny and false pretenses was subsequently present in the state for a single day nearly a year before the institution of any prosecution against him does not entitle such state to demand him from another as a fugitive from justice.

4. **ASYLUM FOR CRIMINALS.** The doctrine of the necessity of the corporeal presence within a state of an offender at the time of the commission of an alleged offense therein to render him a fugitive from justice and extraditable from another state does not tend to render the several states asylums for criminals who may inflict injury upon persons or property within a state when not actually present therein, since each state has power to punish crimes committed within its borders.

5. **TRIAL — STIPULATION — CONSTRUCTION.** A stipulation that an alleged offender sought to be extradited for offenses charged to have been committed on specified dates was not in the demanding state at the time of the offense charged cannot be limited as an admission only that the accused was not in the state at the particular dates alleged in the indictment, but must be construed as an admission of his absence when the crimes were committed, especially where such view is confirmed by the argument of the counsel making the stipulation.

6. **HABEAS CORPUS — REVIEW OF WARRANT.** The action of the governor of the state in issuing a warrant for the extradition of an alleged fugitive from justice can be reviewed by writ of habeas corpus.

7. **ALIBI.** Mere proof that one accused of crime and sought to be extradited was not within the demanding state at the time of the commission of the offense, does not necessarily require or justify his discharge in requisition proceedings or on habeas corpus, since the guilt or innocence of an alleged fugitive from justice cannot be determined therein.

8. **EVIDENCE — WARRANT.** A warrant issued by a governor of a state for the extradition of an alleged offender does not conclusively establish the facts recited therein, but they are to be taken as presumptively true in the first instance.

9. **JUDICIAL KNOWLEDGE.** On habeas corpus proceedings to inquire into the cause of detention of one held under an extradition warrant, the facts recited in the warrant or stipulated by counsel are all that the court can judicially know concerning the circumstances of the alleged crime, where the record does not contain the indictment or other proof as to the facts.

10. **STIPULATIONS — RECITALS IN EXTRADITION WARRANT.** Stipulations or admissions of counsel entered upon the record in a habeas corpus

proceeding to inquire into the cause of detention of one held under a warrant of extradition, overcome every contrary presumption arising from the facts stated in the warrant.

11. OFFENDER'S PRESENCE IN DEMANDING STATE — PRESUMPTION. The surrender of one accused of crime in another state, in violation of the rule that extradition will be granted only where the offense was committed by one actually present in the demanding state, is not warranted on the theory that it may be shown upon the trial that the accused actually committed the crimes at a later day than laid in the indictment while temporarily in the state for a few hours, where no claim is made that such is the fact.

People ex rel. Corkran v. Hyatt, 72 App. Div. 629, reversed.

(Argued June 12, 1902; decided October 7, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered May 26, 1902, which affirmed a final order of Special Term dismissing a writ of habeas corpus and remanding the relator to custody.

The facts, so far as material, are stated in the opinion.

Adelbert Moot and *William L. Marcy* for appellant. The constructive presence of Charles E. Corkran in the state of Tennessee, or his constructive participation in the alleged crimes, is not sufficient to sustain the governor's warrant, or require that he be delivered to representatives of the state of Tennessee, to be carried to that state for trial. (Const. of U. S. art. 4, § 2; Spear on Extradition, 311, 312; *Tennessee v. Jackson*, 36 Fed. Rep. 258; *Jones v. Leonard*, 50 Iowa, 106; *Matter of Mohr*, 73 Ala. 503; *Wilcox v. Nolze*, 34 Ohio St. 520; *Hartman v. Aveline*, 63 Ind. 344; *Matter of Jackson*, 2 Flippin, 189; *Ex parte Smith*, 3 McL. 121; *North Carolina v. Hall*, 115 N. C. 811; *Ex parte Reggel*, 114 U. S. 642; *Matter of Mitchell*, 4 N. Y. Cr. Rep. 596.) The fact that the relator went to the state of Tennessee July 2, 1901, for lawful business purposes, and was there during that day and then went to the state of Tennessee again on the 16th or 17th of July, 1901, and remained one day, and then returned to his home, does not furnish evidence of guilt,

N. Y. Rep.]

Points of counsel.

or evidence that he was fleeing from justice. It being charged that the crime of false pretenses or grand larceny was committed on various days from April 20 to June 24, 1901, the absence of relator from the state of Tennessee from the 1st day of May, 1899, to the 2d day of July, 1901, raises a conclusive presumption of innocence in his favor, which is not affected or removed by relator's presence in Tennessee on July 2 and on July 16, 1901, after the crime was complete, there being no proof that at that time he knew any crime was charged against him, or that he then submitted himself to the laws of Tennessee, or the jurisdiction of her courts. As the indictments were not found until February 26, 1902, relator's two visits to Tennessee in July, 1901, furnish no evidence whatever of guilt or of fleeing from justice, but the presumption is to the contrary. (2 Moore on Extradition, §§ 584, 585, 588.) An alibi, like the absence of accused from a state when a crime is committed, is a perfect legal defense. (*People v. Lyon*, 99 N. Y. 210; *Adams Case*, 1 N. Y. 173; *Brady Case*, 56 N. Y. 186; *Roberts Case*, 116 U. S. 95; *State v. Stewart*, 60 Wis. 587; *Cook v. Hart*, 146 U. S. 195.)

J. Murray Downs and *Robert G. Scherer* for respondent. A person charged with crime may be extradited, although he was not within the demanding state at the time of the commission of the alleged offense. (U. S. R. S. § 5278; *People ex rel. v. Cross*, 135 N. Y. 541; *Roberts v. Reilly*, 116 U. S. 80; *Streep v. U. S.*, 160 U. S. 128; *Matter of Adams*, 7 Law Rep. 386; *Adams v. People*, 1 N. Y. 173; *Matter of Cook*, 49 Fed. Rep. 833; *Regina v. Jacobia*, 46 L. T. [N. S.] 595; *State v. Grady*, 34 Conn. 118; *Comm. v. White*, 123 Mass. 430; *Comm. v. Smith*, 93 Mass. 243.) The Supreme Court is limited on habeas corpus to review but one question, namely, the question of identity. (*People ex rel. v. Morton*, 156 N. Y. 136; *Matter of Davies*, 168 N. Y. 101; *People ex rel. v. Howland*, 155 N. Y. 282; *Terlinden v. Ames*, 184 U. S. 270.)

CULLEN, J. The relator was arrested and held under a mandate or warrant of the governor of this state issued on the requisition of the governor of the state of Tennessee for the delivery of the relator as a fugitive from justice. The mandate of the governor recites that it has been represented to him that the relator stands charged in the state of Tennessee with having committed the crime of larceny and false pretenses in the county of Davidson, and that he had fled from said state and taken refuge in the state of New York. By stipulation between the parties it was conceded that the indictments attached to the requisition papers under which the governor issued his warrant were found on the 26th day of February, 1902, and that the alleged crimes charged in the indictments were committed on May 1st, 1901, May 8th, 1901, and June 24th, 1901, respectively. At the hearing had on the return of the writ of habeas corpus it was further stipulated between the parties that the relator was not in the state of Tennessee at the time of the commission of any of the offenses charged against him, but in the state of Maryland, which was his residence. It appeared by his testimony that he went to Nashville in Tennessee on the second day of July, 1901, to accept the resignation of one Albright, the president and treasurer of the American Hardwood Company, in which the relator was interested, and was then elected president of the company in said Albright's stead; that that evening he left Nashville and never was again in the state of Tennessee except passing through there on the 16th or 17th of July. It is not claimed that the offenses for which the extradition of the relator was sought were committed when he was in the state of Tennessee, but it is contended that though not corporeally present at the time of the commission of the offense he may nevertheless be properly surrendered as a fugitive from the justice of that state where it was committed.

It is to be premised that the power of a government to punish for extraterritorial crimes is a very different question from that of its right to require the surrender to it from foreign countries for trial and punishment persons alleged to

N. Y. Rep.]

Opinion of the Court, per CULLEN, J.

have committed such offenses. Some governments assume to impose the obligations of their penal laws either in whole or part on their citizens, no matter where they may be. We have a notable example of this rule in the recent punishment of a British peer for an alleged bigamy committed in the United States. Some governments assume to go even further and punish an alien for an offense committed against their citizens, though the offense is committed in a foreign jurisdiction. Publicists and writers on international law differ greatly as to the right of a government to punish for offenses committed without its territory. A full review of this subject is to be found in the work of Mr. John Bassett Moore, late assistant secretary of state of the United States, on "Extra Territorial Crime." The power of any government to punish for such an offense necessarily depends upon its ability to obtain possession of the defendant; and though each government assumes to define its own powers, still it may be restrained by the action of the government of which the offender is a citizen, invoked on his behalf, as was the case in the controversy between this country and Mexico in relation to which the report of Mr. Moore was written. Not so with extradition between the states of the Union; it is not governed by international law, but depends solely on the provisions of the Constitution of the United States and the act of Congress made from it. The power of a state to punish a fugitive from justice after obtaining custody of his person depends in no way on how that custody was obtained. Even if the offender has been kidnapped in another state and brought within the territory of the prosecuting state, that fact does not affect the jurisdiction of the latter to punish him for the offense. (*Ker v. Illinois*, 119 U. S. 436; *Cook v. Hart*, 146 U. S. 183.) Nor will a person be relieved from prosecution at the intervention of the state from which he was abducted by violence. (*Mahon v. Justice*, 127 U. S. 700.) In *Lascelles v. Georgia* (148 U. S. 537) it was said: "If the fugitive be regarded as not lawfully within the limits of the State in respect to any other crime than the one on which his

surrender was effected, still that fact does not defeat the jurisdiction of its courts to try him for other offenses any more than if he had been brought within such jurisdiction forcibly and without any legal process whatever." It was there held that interstate rendition did not depend on comity or contract, but on the provisions of the Constitution of the United States. It will thus be seen that the condition of a citizen of one state surrendered to another for criminal prosecution has not the safeguards which exist in international extradition, for the surrendering state is without any standing to intervene in his behalf however much its process may be abused. Therefore, it necessarily follows that no person can or should be extradited from one state to another unless the case falls within the constitutional provision, and that the power which independent nations have to surrender criminals to other nations as a matter of favor or comity is not possessed by the states.

The provision of the Constitution of the United States (Art. 4, sec. 2, subdiv. 2) is: "A person charged in any state with treason, felony or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." Under this Congress has enacted (Sec. 5278): "Whenever the executive authority of any State or territory demands any person as a fugitive from justice, of the executive authority of any State or territory to which such person has fled, and produces a copy of an indictment found or an affidavit * * * charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or chief magistrate of the State or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or territory to which such person has fled to cause him to be arrested * * * and to cause the fugitive to be delivered * * *." It will be seen that to authorize or require a state to surrender to another state an alleged offender it is necessary not

N. Y. Rep.]

Opinion of the Court, per CULLEN, J.

only that such person stand charged with crime, but that he has fled from justice. What constitutes a fugitive from justice has been the subject of much discussion by eminent text writers and of many decisions by the courts and by the governors of the several states. There seems to be substantial unanimity in all the authorities on one proposition, that to be a fugitive from justice a person must have been corporeally present in the demanding state at the time of the commission of the alleged crime. "The case, and the only case, for which the Constitution provides, is that of a person who is charged with crime in one State and who flees to and is found in another State. This is the whole of the case." (Spear on Extradition, 311.) "The question of constructive presence at the commission of a crime has frequently arisen in the case of obtaining money or goods by false pretenses, and it has been held that such presence in the demanding state is not sufficient as a basis for a requisition for the surrender of a person as a fugitive from justice, although, if the person charged were to come within the jurisdiction of that state, he might be arrested and punished for the false pretenses there committed while he was corporeally elsewhere." (Moore on Extradition, sec. 584.) In *Matter of Reggel* (114 U. S. 642) it was said by Mr. Justice HARLAN: "Undoubtedly, the act of Congress did not impose upon the executive authority of the Territory the duty of surrendering the appellant, unless it was made to appear, in some proper way, that he was a fugitive from justice. In other words, the appellant was entitled, under the act of Congress, to insist upon proof *that he was within the demanding State at the time he is alleged to have committed the crime charged*, and subsequently withdrew from her jurisdiction, so that he could not be reached by her criminal process." In *Roberts v. Reilly* (116 U. S. 80) it is said by Mr. Justice MATTHEWS: "To be a fugitive from justice, in the sense of the act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the State in which the crime is alleged to have been committed, after an indictment found,

or for the purpose of avoiding a prosecution anticipated or begun, but simply that having *within a State* committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another." In *Matter of Voorhees* (32 N. J. L. 141) a fugitive is designated as one "who commits a crime within a state and withdraws himself from such jurisdiction." In *Wilcox v. Nolze* (34 Ohio State, 520) it is said, referring to the constitutional provision: "These words, taken as they must be in their natural and obvious sense, do not include a case of constructive presence in the demanding state and constructive flight therefrom, but relate only to a case where the accused is actually present in the demanding state at the time he commits the act of which complaint is made." The same principle has been held in *Hartman v. Aveline* (63 Ind. 344); *Jones v. Leonard* (50 Iowa, 106); *Matter of Mohr* (73 Ala. 503); *In re Jackson* (2 Flippin, 183); *Ex parte Smith* (3 McLean, 121). It is stated in a note found in Mr. Moore's work on Extradition (p. 948) that "the Interstate Extradition Conference held in New York City in August, 1887, refused to adopt a recommendation to the governors of the various States and Territories that no demand be complied with where the fleeing was constructive, on the ground that the decisions of the courts already covered the case."

Hibler v. State (43 Texas, 197) is not in conflict with these authorities, for there a fugitive from justice was defined to be "A person who commits a crime in one State for which he is indicted, and departs therefrom and is found in another State." The only case cited as authority for a contrary doctrine is *In re Cook* (49 Fed. Rep. 833), reported in the Supreme Court as *Cook v. Hart* (146 U. S. 183). In the opinion there delivered by the district judge it is said: "One may commit an offense against a state upon whose soil he has never set foot." I have already said this may be true, but it does not determine the question whether the offender is a fugitive from justice. In that case the petitioner was under

N. Y. Rep.]

Opinion of the Court per CULLEN, J.

arrest in Wisconsin, having been extradited by the governor of the state of Illinois. He sought relief from imprisonment by writ of habeas corpus from the United States Circuit Court for Wisconsin. The question of the propriety of his extradition was, therefore, not properly before the court, and the decision of the Circuit Court remanding the relator was affirmed by the Supreme Court on the express ground that it was immaterial how the relator's presence in Wisconsin had been secured; that it was sufficient that at the time of the writ he was subject to its territorial jurisdiction. Nor did the case in fact require from the learned judge the statement cited. The relator was charged with having as a banker fraudulently received deposits. He had been in the state of Wisconsin a few days before, and knowing the bank to be insolvent, gave his clerks directions to receive deposits. His subsequent departure from the state, under all the authorities, made him a fugitive from justice.

The question discussed has never been passed upon by the courts in this state, but has been considered by several of our governors. In *Matter of Mitchell* (4 N. Y. Crim. Rep. 596) will be found an opinion by Governor Hill on an application for the extradition of Thomas Mitchell. Mitchell was charged with having committed manslaughter in Jersey City by reason of his ownership of an unsafe building in that place which fell and killed four persons. It appeared that Mitchell had not been in New Jersey for some weeks prior to the accident. The governor refused to extradite him, holding that "The actual presence of the accused party in the demanding State, at the time of the commission of the alleged offense, is a jurisdictional fact." This view has been accepted by the governors of Massachusetts, of Maryland, of Tennessee and of Illinois. (See Moore on Extradition, sec. 579 *et seq.*) It is claimed that this court has held a contrary doctrine in *Adams v. People* (1 N. Y. 173). The defendant Adams was indicted and convicted for obtaining money under false pretenses under a fraudulent warehouse receipt which he transmitted from Chillicothe, in Ohio, to the prosecutors, merchants in

New York city. The case in no respect involved the question of the constitutional obligation of the governor of Ohio to surrender the defendant to the authorities of the state of New York, but only of the power of this state to punish him after having secured jurisdiction of his person. Under the authorities already cited from the Supreme Court of the United States it was of no importance how the jurisdiction of his person was obtained.

If the relator was not otherwise subject to extradition to the state of Tennessee, because he was not personally present in that state at the commission of the alleged offenses, his subsequent presence in the state for a single day, nearly a year before the institution of any prosecution against him, could give that state no right to require his surrender. The question is whether he is a fugitive from justice, not whether the courts of the state of Tennessee have jurisdiction of his alleged offenses. That jurisdiction they have at all times, if at all, provided they secure his person. I am at a loss to imagine how a man's voluntary visit to a state can constitute him a fugitive from the state when he was not such before. I consider it as having exactly the contrary effect. If there be any force in this occurrence it must be not in his going into the state but in his failing to remain there. It is not, however, suggested that he in any respect offended against the laws of Tennessee while present there. He went there for a specific purpose, and his business accomplished, immediately left. It is not pretended that his stay was curtailed or that he left the state on account of any suspicion of a prosecution. Would he have been liable to extradition because on a journey to New Orleans his route passed through the state of Tennessee? Such a result seems to me utterly unreasonable. No distinction can be drawn between the two cases. In the case of *Adams*, already referred to, the prisoner sought discharge from arrest by habeas corpus, and the opinion of Judge VANDERPOEL of the Superior Court of the city of New York denying the application is found in 7 Law Rep. (p. 386). *Adams* came voluntarily into the state, and after

making an engagement to meet one of the prosecutors, suddenly left the state and failed to keep his engagement. The decision proceeded on the ground that the evidence justified the inference that the prisoner prematurely departed from the state with the view of avoiding arrest and prosecution for his crime. The case has not escaped criticism, though its doctrine may be correct when limited to the facts of the case; that is to say, a departure from the state to avoid prosecution, of which there is no suggestion in the case before us. In truth, however, the questions discussed by the court were not properly before it at all. They could have been raised in the state of Ohio, but not in New York.

It is urged that this doctrine of the necessity of corporeal presence in the state where the offense is alleged to have been committed will render the several states asylums for criminals, the effect of whose offenses is injury to property or persons in other states. There is no practical danger of the kind. It may be safely stated that nearly every state, as well as our own, punishes crimes committed within the state, although the results of the crimes are effected without its territory. The relator would be properly surrendered to the state of Maryland, where he was at the time of his alleged offense, if that state made demand for him. On the other hand, there is great danger that citizens may be carried into other states to be punished for acts which are not criminal in the jurisdiction in which they were committed. The case of false pretenses is a notable example. By our Penal Code (Sec. 544) it is provided that "A purchase of property by means of a false pretense is not criminal, where the false pretense relates to the purchaser's means or ability to pay, unless the pretense is made in writing and signed by the party to be charged." This was doubtless dictated by the knowledge that criminal charges of false pretenses are often instituted in reality to compel the payment of debt, and are easily fabricated. It may be that this provision of the Code has no extraterritorial effect, and that a citizen of this state if found in another state may be punished there for alleged oral pre-

tenses made here. But neither the Constitution nor the Federal statute requires this state to surrender him for prosecution in another jurisdiction. These considerations equally apply to prosecutions for libels alleged to have been committed in newspapers published here and circulated throughout the country. The real evil of the day is not the insufficiency of the criminal laws, but the excessive multiplication of statutory crimes.

It is suggested (though not by counsel) that I have construed the stipulation of the counsel for the state of Tennessee too broadly and that it was intended to admit only that the defendant was not in Tennessee at the particular dates alleged in the indictment, not that he was absent from Tennessee at the commission of the offenses charged against him. The brief of the learned counsel entirely disposes of this suggestion. He makes but two points: 1. "A person charged with crime may be extradited although he was not within the demanding state at the time of the commission of the alleged offense;" 2. "The Supreme Court is limited on habeas corpus to review but one question, namely, the question of identity." I have, therefore, but followed the counsel's own construction of his admission.

We now reach the question whether the action of the governor can be reviewed on habeas corpus. It has been held by the Supreme Court of the United States in *Robb v. Connolly* (111 U. S. 624) that the governor of a state in the execution of the duty of surrendering fugitives imposed by the Constitution and the statute of Congress does not act as a United States officer and that a writ of habeas corpus may be issued by the state courts to test the validity of an arrest under his warrant. In *Roberts v. Reilly* (*supra*) it was said: "How far his (the governor's) decision may be reviewed judicially in proceedings in habeas corpus, or whether it is not conclusive, are questions not settled by harmonious judicial decisions, nor by any authoritative judgment of this court." In *Cook v. Hart* (*supra*) it was held: "We have no doubt that the governor upon whom the demand is made must determine for himself, in the first instance at least, whether the party charged is in fact

N. Y. Rep.]

Opinion of the Court, per CULLEN, J.

a fugitive from justice, *but whether his decision thereon be final is a question proper to be determined by the courts of that state.*" The Constitution and laws of the state of New York, therefore, control the decision of the question we are now considering. While doubtless to a certain extent the action of the governor is executive or ministerial, it is not so in the broad sense in which the general functions of the office are conferred upon him by our Constitution. In *Matter of Guden* (171 N. Y. 529) we held that the power given to the governor to remove a sheriff upon charges and after a hearing was executive and the exercise of that power not subject to review by the courts. But the question here is of an entirely different character. It involves the liberty of the citizen. Speaking of the division of powers among the three great branches of the government, PARKER, Ch. J., in the *Guden* case said: "There resides in the people of this and every state an absolute power to prescribe rules of action, through legislation, to enforce rules of action and to transact generally the affairs of government, through executive acts, and to determine controversies between, enforce rights belonging to, and redress wrongs done to, citizens of the state, through the courts." The liability of the citizen to arrest and detention, and the grounds therefor, therefore, necessarily present a judicial question, though the arrest and detention are effected by an executive or ministerial officer. The act of Congress provides that a copy of the indictment or the affidavit before a magistrate shall be proof of the charge of crime against any person whose extradition is sought, but it does not prescribe what shall be evidence that he is a fugitive from justice. The fact that he is a fugitive is, therefore, a matter of proof. While the warrant of the governor is presumptive evidence of the fact, there is no reason on principle why it should be conclusive. It was said by Judge JENKINS in *Matter of Cook* (*supra*), referring to the case of *Roberts v. Reilly*: "That decision by its very terms implies that the action of the governor is only presumptively regular, and can be reviewed by the courts. Surely it cannot be claimed that such action is conclusive

upon personal right, and may not be inquired of by judicial tribunals. Surely it cannot be that the right to personal liberty hangs upon so slender a thread as the arbitrary will of the authorities of the demanding and surrendering states. 'No person shall be deprived of life, liberty or property without due process of law.' That is the fundamental law of the land, coming to us from Magna Charta. It is not due process of law which condemns without hearing, which convicts without trial. * * * It is essential to compliance with such executive demand that the person whose surrender is demanded should be adjudged a fugitive from the justice of the demanding state. The decision of the executive is not conclusive of that fact." The writ of habeas corpus is in this state available to every person imprisoned or deprived of his liberty, unless he is restrained under the authority of the Federal government, or unless he is committed by virtue of a final judgment or decree of a competent tribunal of jurisdiction, or the final order of such a tribunal punishing him for contempt. The warrant of the governor is not a final judgment nor a decree, and even were it such it would be the duty of the court to see whether the jurisdictional facts exist which are necessary to authorize the action of the governor. The provision of section 827 of the Code of Criminal Procedure, directing that any person arrested on the governor's mandate shall be brought before a judge of a court of record and informed of his right to a writ of habeas corpus to inquire into his identity with the person named in the warrant does not assume to limit the inquiry on a writ of habeas corpus to the question of identity. It was enacted for the benefit of any person arrested under such a warrant and solely as an additional safeguard against illegal removal from the state. As was held in *People ex rel. Tweed v. Liscomb* (60 N. Y. 560), "This writ cannot be abrogated, or its efficiency curtailed, by legislative action. * * * The remedy against illegal imprisonment by this writ, as it was known and used at common law, is placed beyond the pale of legislative discretion, except that it may be suspended when

public safety requires, in either of the two emergencies named in the Constitution." If, therefore, on the return to the writ it is clearly shown that the relator is not a fugitive from justice and there is no evidence from which a contrary view can be entertained, which is the fact in this case, as appears by the stipulation and concession of the parties, there is no reason why greater efficacy should be given to the warrant of extradition than to the warrant of any other magistrate by which a citizen is imprisoned or deprived of his liberty. In *People ex rel. Lawrence v. Brady* (56 N. Y. 182) this court discharged the relator, who was held under a warrant of extradition issued by the governor of the state, on the ground that the affidavit on which the surrender was asked did not state a crime. In *People ex rel. Draper v. Pinkerton* (77 N. Y. 245) the only question decided was whether the warrant of the governor recited the facts necessary to confer authority under the Constitution and laws of the United States and was sufficient justification for holding the prisoner to be brought up on habeas corpus without producing the papers or evidence upon which the governor acted. It was held that the recitals were to be taken as *prima facie* true, no proof to the contrary having been introduced by the prisoner. In *People ex rel. Jourdan v. Donohue* (84 N. Y. 438) again the only question was the sufficiency of the executive warrant on its face. Referring to criticisms that had been made on the decision in the *Lawrence* case the court said: "And hence we have held that where the preliminary papers upon which a warrant of extradition has been granted are produced, and are before us, it is our right and our duty to examine them, and judge and determine, when our process is invoked, whether they are sufficient, under the law, to justify the warrant of extradition. Our ruling in this respect has not escaped criticism; but an opposite conclusion, which would make the determination of the executive final, even though the papers produced clearly showed that the essential preliminaries of the law were unfulfilled, does not yet commend itself to our judgment." In all these cases the question related to the sufficiency of the charge

against the prisoner, not to his being a fugitive. But if the courts can review the action of the governor on one prerequisite for extradition, it is difficult to see why they cannot equally review his action on the other. The great weight of authority in other states is in favor of such a review. It was so held in the cases of *Jones v. Leonard* (*supra*), *Wilcox v. Nolze* (*supra*), *Hartman v. Aveline* (*supra*) and *Matter of Mohr* (*supra*). In the *Wilcox* case it is said: "Whether or not the accused committed the acts complained of while actually present in the demanding state is jurisdictional, and it is clearly competent, in such case, to show by parol evidence a defect in the executive power, however regular the extradition papers may be in matter of form." In the *Jones* case it is said: "The governor of this state is not clothed with judicial powers, and there is no provision of the Constitution or laws of the United States or of this state which provides that his determination is final and conclusive in the case of the extradition of the citizen. In the absence of such a provision we hold that the decision of the governor only makes a *prima facie* case; that it is competent for the courts in a proceeding of this character to inquire into the correctness of his decision, and discharge the prisoner." In the *Mohr* case the learned court said: "We are of opinion that the probate judge did not err in discharging the petitioner, and that it was competent for him to hear oral evidence in order to establish the fact that the petitioner was not a fugitive from justice. Any other conclusion than this would establish a doctrine very dangerous to the liberty of the citizen. It would greatly impair the efficacy of the proceeding of habeas corpus, which has been often characterized as the great writ of liberty, and may be regarded, not less than the right of trial by jury, as one of the chief corner stones in the structure of our judiciary system. It might justly be considered as alarming to announce that a writ which has so frequently been used for centuries past to prevent the encroachment of kings upon popular liberty is inadequate for the just purposes for which it has been invoked in this case."

There is little to be added to what has been so well said by the jurists of other states. The further suggestion, however, may be made, that no law gives a person sought to be extradited the right to a hearing before the governor or to submit evidence in his behalf. Whatever in these respects may be accorded by the governor to the accused is a matter of favor, not of right. Therefore, unless he may review his extradition on habeas corpus, a citizen, on the fiat of an executive officer, without a hearing, may be transported a prisoner to the utmost confines of the country. It has been held by the Supreme Court of the United States that in the case of foreign extradition there must be some competent evidence before the magistrate to authorize the surrender of the accused. (*Ornelas v. Ruiz*, 161 U. S. 502.) But if the orders made below are upheld, in the case of interstate extradition, a citizen may be surrendered without the slightest evidence either of his guilt or that he is a fugitive.

The guilt or innocence of an alleged fugitive from justice is not to be determined on requisition proceedings, nor on the writ of habeas corpus. Therefore, if the charge is such as to necessarily require the presence of the accused within the state at the time of the commission of the offense, mere proof of an alibi would not in every case require or justify his discharge. But the question in the present case is not one of alibi, for the stipulation of the parties admits that the defendant was not personally present in the state of Tennessee at the commission of the alleged offenses.

For these reasons the orders of the Special Term and the Appellate Division should be reversed and the relator discharged from custody.

O'BRIEN, J. I agree with Judge CULLEN in his exposition of the principles applicable to this case. It may possibly be useful to add to this very clear and able exposition of the law some suggestions with a view of eliminating from the case certain considerations that are misleading and wholly foreign to the questions involved and a word with respect to the func-

tions of the writ of habeas corpus and the procedure thereon in cases of interstate extradition. It is declared by statute to be a state writ to inquire into the cause of detention and in a proper case to discharge the person from all restraint of his liberty. In some cases the writ cannot issue at all, namely in cases where the restraint or detention is by virtue of a mandate from a court or judge of the United States in cases where such court or judge has exclusive jurisdiction. Neither can it issue in a case where the party is detained by virtue of the final judgment or decree of any competent tribunal civil or criminal. (Code, sec. 2016.)

The applicant for the writ must show affirmatively in his petition that he is not detained under any such process, and should it appear upon the hearing that he is, then he must be remanded. (Code, secs. 2032-33.) In other words, when certain facts are made to appear as the cause of the detention the inquiry can go no farther, but must stop and the applicant must be remanded, however unjust in point of fact his detention may be. In all other cases there are no limitations upon the scope of the inquiry, but it must proceed until the issue is determined according to the rules of law applicable to such a case. The burden in the first instance is upon the officer or party who detains the person to show that such detention is authorized by some legal authority.

The relator in this case was not detained under process from any court, civil or criminal, but under an executive warrant commanding the defendant to deliver him to an agent of another state, to be brought to that state for trial upon a charge of crime alleged to have been committed in that state, and hence all the facts were open to inquiry. The defendant made return to the writ that he detained the relator under this warrant, but exhibited no other document or paper to sustain the warrant. The warrant on its face stated that it had been represented to the governor of this state by the governor of the state of Tennessee that the relator was charged in that state with the crime of larceny and false pretenses and that he had fled from that state and taken refuge in this state.

These statements on the face of the warrant were to be taken as presumptively true in the first instance, and, if the inquiry rested there, the defendant had made out a *prima facie* case to justify the detention. It is important here to note and to keep always in view that when the defendant presented the executive warrant without any other document or paper or any other proof of the facts therein stated he raised only a presumption. The warrant did not conclusively establish the facts recited. It was so held by this court (*People ex rel. Lawrence v. Brady*, 56 N. Y. 182), and the law as laid down in that case has never been modified but has been repeatedly approved. Indeed, I do not understand that there is now any difference of opinion as to the legal effect of the warrant as evidence. It raised a presumption but nothing more. I am not aware of any case in any court of controlling authority where it was held to be conclusive and no reason is given why it should be.

But a mere legal presumption is good and justifies an act only until it is removed by proof of some other fact, and when so removed the act stands without authority or justification. That, in my opinion, is just what happened in this case as will appear hereafter. It must be borne in mind all the time that we know nothing and can know nothing judicially concerning the facts or circumstances of the larceny and false pretenses charged in the warrant. The record does not even contain the indictment or any paper or proof as to the facts, if any, that transpired in the demanding state. All we know or can know are the things recited in the warrant. The statute provides (Code, sec. 2039) that the relator may, under oath, deny any material allegation of the return or state any fact to show that his detention was illegal or that entitled him to his discharge. The relator did so traverse the return and thus put the facts stated in the warrant in issue. The court thereupon was required to proceed in a "summary way to hear the evidence" and dispose of the case as justice required. The relator proved one material fact conclusively and that was that he was not within the demanding state at the

time of the commission of the crime as that fact was averred in the indictment. I do not mean that his oath on that point was conclusive, but the proof was of a higher character, namely, the stipulation of the respective attorneys in open court. These were admissions upon the record that import absolute verity for all the purposes of the inquiry and they had the legal effect to remove every presumption to the contrary that arose from the face of the warrant. (1 *Greenleaf's Ev. sec. 186.*) It is important to understand the real scope and effect of these admissions. They were (1) That three indictments were attached to the requisition papers upon which the warrant was issued and as they were not produced we know nothing as to their contents except as stated in the admission and that statement was: (2) That all of them were found on February 26, 1902, and the alleged crimes were charged in the indictments to have been committed on May 1, 1901, May 8, 1901, and June 24, 1901, respectively. So that we simply know that the relator was charged with three distinct offenses of larceny and false pretenses committed on the dates above stated. (3) It was also admitted and stipulated that the relator was not within the state of Tennessee between May 1, 1899, and July 1, 1901, but was in that state on July 2, 1901.

These are all the facts that the demanding state elected to disclose upon the hearing of the writ of habeas corpus as the grounds for taking the relator from this state against his will into another jurisdiction. Not a single fact is before us that raises any question as to the constructive presence of the relator in the demanding state on the dates named in the indictment or that would warrant even the suspicion that he committed the crimes charged by means of an innocent agent. All that is said upon that subject is pure conjecture without any fact upon which to build up the speculation. On the record before us the relator was presumptively personally present in the demanding state at the dates named and there took and carried away the property claimed to have been stolen or he did not and could not commit the offense charged

in that state at all. It having been conclusively established that the relator was not in the demanding state on the dates when the crimes are charged to have been committed, it follows that he could not have committed the offenses and certainly could not have fled from the justice of the demanding state. The authorities are unanimous in holding that a person cannot be a fugitive from the justice of the demanding state who was not in that state when the crime charged is alleged to have been committed. Constructive presence furnishes no basis for executive action. The cases on that subject are collected in a note to the case of *State of North Carolina v. Hall* (28 L. R. An. 289). The presumption arising from the recitals in the executive warrant was completely overthrown by the admissions upon the hearing before the court that the relator was not in the demanding state at the dates when it was alleged that the crimes were committed, and this left the warrant, under which the relator was in custody, without any basis upon which to rest.

This proposition is met only in one way and by one line of argument which should now be noticed. It is suggested that since the relator was in the demanding state on the 2d day of July, 1901, for a few hours on a temporary errand of business, that he may have committed some or all of the crimes charged while there on that day, and that since the precise dates stated in the indictment are not material, it may be shown upon the trial that he actually did commit the crimes on that day and hence this court should send the relator to the demanding state for trial. This suggestion may possibly have the merit of ingenuity, but as a method of reasoning or argument, or as a judicial utterance in a case involving personal liberty, it is to be hoped that this court will not adopt it. The state of Tennessee and its agent were represented at the hearing upon the writ by able counsel. All the facts and circumstances constituting the alleged crimes were open to inquiry. It could have been shown that there was or might have been a mistake in stating the dates in the indictment, or it could have been shown that the crimes were actually

committed on the 2d day of July following, but nothing of the kind was claimed or even suggested. The demanding state, its agent and counsel, for some reason, elected to withhold all proof of the facts and circumstances of the alleged larcenies and to stand upon the bare recitals in the warrant. The *prima facie* proof that the state gave, consisting only of the recitals of the warrant, that the relator was personally present there at the dates named and committed the crimes, was superseded and removed by the solemn and conclusive admissions in open court that he was not there at the time, and consequently could not have fled from justice. When the prosecution alleges and proves a larceny committed at a designated time and place, and makes no claim that it was committed at any other time or place, and the accused then shows by conclusive proof that he was not in the state on the days designated, nor for a year before, nor for eight days after, and the case rests upon these facts alone, without any proof to justify even a suspicion that the crime was committed eight days after the date laid in the indictment, it would be a strange rule of law that would permit the case to go to the jury in order to procure a finding that, after all, the time laid in the indictment was a mistake and the crime was committed by the accused at the later date.

But the case of *Roberts v. Reilly* (116 U. S. 80) is cited to sustain this line of argument, and an expression of the learned judge who spoke for the court is made prominent. This court and every other court has often commented upon the value of isolated judicial expressions in an opinion as authority. The facts of the case upon which the decision was based must be compared with the one in hand in order to enable us to interpret the decision and the language of the opinion. The difference in the facts of that case and the one at bar is so radical and fundamental that it will be seen at a glance that it has no application.

(1) In that case the state of New York, the demanding state, took a very different course from that adopted by the demanding state in the case at bar. It did not rest its right

upon the recitals of the warrant, but produced all the papers upon which it issued, thus disclosing to the court all the facts and circumstances constituting the crime charged. The warrant was there supported by all the preceding facts and the recitals became wholly immaterial; not so here, since the recitals give us all the light we have, and they are conclusively contradicted by the admissions of record.

(2) Not only did the court have all the papers before it, but proof was given *dehors* the record as to all the facts and circumstances of the crime. There was full disclosure and nothing was withheld, so that at the close of the hearing the question whether the accused was or was not a fugitive from justice was one of fact. Not so in this case, since, after the admissions, we have not a single fact left to show that the relator fled from the state of Tennessee.

(3) In that case there was nothing but the oath of the accused that he was not in the demanding state at the time charged in the indictment, and that was of no consequence against all the other proof to show that he was. His oath was not conclusive, whereas in the case at bar we have an admission that is conclusive that he was not in the state at the time, and nothing to place against it unless we are to presume that the crime was committed on the 2d day of July, when no one claims that it was. The court ought not to presume that the crime was committed on that day against the allegations of the indictment and without any claim from any source that it was. If presumptions are to be made in such a case, they should be in favor of personal liberty and not against it.

But the question whether the relator committed larceny in the state of Tennessee at any time when he was personally present there is not really in the case at all, since there is not now and never was any serious claim that he was in that state when the crimes charged were committed, otherwise than constructively. Constructive presence in the demanding state is the sole basis of the claim that the relator fled from its justice, and as already suggested, there is no case or authority that I

am aware of that sustains such a claim. All the cases are the other way, and we must either disregard these cases or adopt the fiction that the offenses were really committed by the relator while he was in the state on July 2d, 1901.

It may before closing be profitable to call special attention to a case quite similar, since it shows how such cases as this are considered and disposed of by courts in the demanding state of Tennessee. I refer to the case of *State of Tennessee v. Jackson* (1 L. R. An. 370) which is quite instructive. It appears that Jackson resided in Chicago. He sold to the prosecutor, who resided at Chattanooga, a horse, the bargain having been made by correspondence. The horse was shipped to the purchaser by rail at the place last named and he remitted by mail to Jackson at Chicago the purchase price. When the horse arrived his qualities were found to be such that the purchaser claimed to have been defrauded out of the price by false and fraudulent statements. He proceeded to obtain a warrant from a justice of the peace at Chattanooga against Jackson in Chicago, charging him with obtaining money by fraud and placed the warrant in the hands of a detective who made an affidavit that Jackson had fled from the state of Tennessee and had taken refuge in the state of Illinois. On this affidavit and warrant he procured a requisition from the governor of Tennessee on the governor of Illinois for the delivery to him of Jackson. Armed with these papers the detective proceeded to Illinois and obtained a warrant from the governor of that state for the arrest of Jackson. He arrested him on the warrant, hurried him off to Tennessee and there had him tried before the justice of the peace, convicted and sent to jail. It will thus be seen that Jackson was not only extradited from his home in another state but actually tried and convicted in the demanding state. But Jackson sued out a writ of habeas corpus in Tennessee and was discharged on the ground that all the proceedings were based upon a falsehood, namely, that he had fled from Tennessee where he had never been before.

The opinion of the court is very brief but pointed. After

citing the act of Congress the learned judge said: "According to the provisions of this law there must be not only the commission of the crime, but the person charged must be a fugitive from the state in which it was committed before the executive authority can be called into action. Jackson was not a fugitive. He had not in all his life been in Tennessee; had never fled from it; and his case did not fall within the positive terms of this law. The oath of the detective was false, and the Governors of the two states imposed upon. The whole proceeding was a fraud upon the law. If this arrest and imprisonment are to be maintained the opportunities for wrong and abuse of law will be great and widespread. Commercial transactions are largely conducted by mail and by telegraph. If the seller at one end of the line and the buyer at the other, with the aid of detectives, in cases of dispute and controversy among them, are to be allowed, under such proceedings as these, to have the citizens of one state carried to another state for trial under the allegation that the person charged has fled, instances of oppression may not be few."

It would be quite difficult to point out any material distinction between that case and the one at bar. It is quite clear that should we send the relator to Tennessee he would be entitled there to his discharge by the same court that discharged Jackson on the facts now before us. That court held that the accused party could not be deprived of his liberty by executive action based upon the false affidavit of a detective that he had fled from Tennessee to Illinois. That, in my opinion, is a safe precedent to follow in this case. Some one in this case has made just such an affidavit. That must follow from the admission that the relator was not in the demanding state at the times stated in the indictment as the dates when the alleged crimes were committed. On the hearing in this case upon the return of the writ, the state of Tennessee could have shown all the facts and circumstances of the alleged crime for which it had demanded the surrender to it of the person of the relator, as this state did in the *Roberts Case* (*supra*). But instead of taking that course, all the facts and circumstances

are left clouded in mystery, except so far as they are disclosed by the admissions referred to. When it admitted that the relator was not in the state at the times laid in the indictment, and gave no other light as to the facts, the case for detention failed. The state of Tennessee does not ask for the surrender of the relator on the ground that he committed any crime in that state on the 2d day of July, 1901, nor does it even suggest that its prosecuting officer made any mistake in stating the 24th of June as the true date of the commission of the offense. The relator is claiming the benefit and protection of the laws of this state which guarantee to him his liberty against all unlawful restraint. If he has actually fled from the justice of the demanding state, of course he ought to be surrendered; but it is admitted that he did not, and it is safe to say that no one believes for a moment that he did except, possibly, in the same way and in the same sense that Jackson fled from the same state in the case cited. Personal liberty must rest in this state upon a very frail and unsafe basis if this court can be induced to send the relator to Tennessee upon such a vague and fanciful conjecture as that which is at the foundation of the fiction that he may in fact have committed the crime on the 2d of July, and that the prior dates stated by the prosecuting officer of that state are the result of some error or mistake. When the state of Tennessee, or some one authorized to speak for it, is willing to assure us that the suggestion is based upon fact and not upon fiction, it will be timely then to entertain it, but until then the courts of this state should treat its solemn admission upon the record according to its fair scope and meaning, which obviously is that the relator was not in the state when the crimes charged were committed. I am in favor of reversing the order.

HAIGHT, J. (dissenting). The relator was arrested by the respondent and held in custody by virtue of a warrant issued by the governor of the state of New York, in which the respondent was required to arrest the relator and deliver him into the custody of one Vernon Sharp, to be taken back to the

N. Y. Rep.]

Dissenting opinion, per HAIGHT, J.

state of Tennessee, from which he had fled, pursuant to a requisition of the governor of that state. The warrant recites the following facts as having been established before the governor of this state. "It having been represented to me by the Governor of the state of Tennessee that Charles E. Corkran stands charged in that state with having committed therein, in the county of Davidson, the crimes of larceny and false pretenses, which the said Governor certifies to be crimes under the laws of the said state, and that the said Chas. E. Corkran has fled therefrom and taken refuge in the state of New York; and the said Governor of the state of Tennessee having, pursuant to the constitution and laws of the United States, demanded of me that I cause the said Chas. E. Corkran to be arrested and delivered to Vernon Sharp, who is duly authorized to receive him into his custody and convey him back to the said state of Tennessee, which said demand is accompanied by copies of indictments, and other documents, duly certified by the said Governor of the state of Tennessee to be authentic and duly authenticated, and charging the said Chas. E. Corkran with having committed said crimes *and fled from the said state* and taken refuge in the state of New York."

Corkran procured a writ of habeas corpus to issue for the purpose of obtaining his discharge. On the return of the writ, the attorneys for the parties stipulated "that three indictments were attached to the requisition papers, sent by the Governor of the state of Tennessee to the Governor of the state of New York, for the extradition of Chas. E. Corkran, that each of said indictments was found on the 26th day of February, 1902, and that the alleged crimes *were charged in said indictments* to have been committed on the 1st day of May, 1901, on the 8th day of May, 1901, and on the 24th day of June, 1901, respectively." It was further conceded by counsel of the respective parties "that the relator was not within the state of Tennessee between the 1st day of May, 1899, and the 1st day of July, 1901." It was also conceded that the relator "*was* in the state of Tennessee on the 2d day of July, 1901." Taking the two stipulations together, it appears that the

relator was not in the state of Tennessee on the dates charged in the indictment, but that he *was* in that state eight days after the date charged in the last indictment. In no place is it stipulated that he was not in the state at the time the offenses charged were committed. If this was an accidental omission, it has not been supplied by any of the evidence before us. The relator subscribed and verified the petition upon which the writ of habeas corpus was issued. In it he alleges "that *it did not* appear that there was any evidence before the Governor of the state of Tennessee at the time he issued his demand that your petitioner was personally or constructively within the limits of the state of Tennessee when the crimes are *alleged* to have been committed." In his affidavit traversing the return to the writ he states that he had read the indictments before the governor of the state of New York upon which his warrant of arrest was issued and that those indictments charged him with the commission of the crimes of larceny and false pretenses, specifying the dates named in the indictments. He then states that he was not in the state of Tennessee at any time during the months of March, April, May or June, 1901. He also was sworn upon the hearing and gave oral testimony, in which he reiterates that he was not in the state of Tennessee during the dates mentioned in the indictments, but concedes that he was there on the 2d day of July, 1901. In neither the petition, affidavit or testimony does he swear that he was not in the state when the offenses charged were committed, but has refrained from so testifying.

There are cases in which time is a necessary ingredient of the offense, as for instance the violation of the Sunday laws; but, barring a few exceptions, I do not understand that the precise time is a necessary ingredient of crimes, either under our Code or the common law. Section 280 of our Code of Criminal Procedure provides that "the precise time at which the crime was committed need not be stated in the indictment; but it may be alleged to have been committed at any time before the finding thereof, except where the time is a material

ingredient in the crime." This provision of the Code is a substantial enactment of the common law upon the subject. (2 Hawk. P. C., 2 Ch. 46; 1 Hale P. C. 361; 1 Arch. Crim. Pr. 85; *Com. v. Harrington*, 3 Pick. 26; *People v. Stocking*, 50 Barb. 573; *Regina v. Firth*, 11 Cox C. C. 234; *People v. Emerson*, 25 N. Y. S. R. 466; *People v. Jackson*, 111 N. Y. 362-369.)

As we have seen, the last indictment charged the crime as having been committed on the 24th day of June. Time is not a material ingredient of the crimes of larceny or false pretenses; it would, therefore, have been competent upon the trial to show that the offenses charged were actually committed on the 2d day of July, when the relator was in the state, instead of the 24th day of June. The indictments were before the governor; they charged the commission of the crime of larceny. The usual allegation is that he did then and there take, steal and carry away, which imports the presence of the person charged. Under the statute a charge may be established before the governor by the production of a copy of the indictment. It, therefore, furnishes some evidence upon which the governor may act. As we have seen, the relator has neglected to show, either by stipulation or by his own testimony, that he was not actually present at the time the offenses charged were committed. He has confined his testimony to showing that he was not there on the particular dates specified in the indictment. This is not sufficient. It consequently follows that the contention of the relator to the effect that the governor had no power to issue the warrant for his arrest and his return to the state of Tennessee for the reason that he was not personally present in that state when the offense was committed is not raised by the record in these proceedings.

The warrant upon which the relator is detained recites all the facts necessary to give the governor jurisdiction to issue it. It is not contended that it is informal or defective in any particular. It recites that the governor of Tennessee presented papers to the governor of this state, duly authenticated,

including copies of the indictments found, charging the relator with having committed the crimes of larceny and false pretenses in that state, and that he "has fled therefrom and taken refuge in the state of New York." This, if true, is sufficient to authorize the governor of this state to issue the warrant for his arrest and return to the state of Tennessee. The papers presented to the governor, upon which he made his determination to issue the warrant, have not been returned or their contents made to appear by the relator, either in his petition or traverse. They, consequently, are not before us, and we are unable to determine whether the conclusion of the governor was proper or without support of evidence.

In the case of *People ex rel. Draper v. Pinkerton* (77 N. Y. 245) the question under consideration appears to have been squarely decided. It is stated in the opinion that "the only material question which seems to be presented in this case is whether a warrant of the Governor of this state for the arrest of a fugitive from justice of another state containing the recitals of facts necessary to confer authority under the Constitution and laws of the United States is a sufficient justification for holding the prisoner when up on habeas corpus, without producing the papers or evidence upon which the Governor acted. *We have no doubt but that the recitals are to be taken as prima facie, at least, true, and that the return setting forth the warrant containing such recital is sufficient.*"

In the case of *People ex rel. Jourdan v. Donohue* (84 N. Y. 438) FINCH, J., in delivering the opinion of the court, says: "The sufficiency of the executive warrant to justify the detention of the prisoner is the sole question raised by the writ of habeas corpus, and presented on this appeal. * * * Where, however, the papers upon which the warrant is founded are not produced, but are withheld by the Executive in the exercise of his official discretion and authority, we can look only to the warrant itself and its recitals for the evidence that the essential conditions of its issue have been fulfilled." He then proceeds to state that all the essential requirements

N. Y. Rep.]

Dissenting opinion, per HAIGHT, J.

of the Constitution and statute are contained in the recitals of the warrant, and concludes by affirming the order dismissing the writ of habeas corpus.

In the very recent case of *Terlinden v. Ames* (184 U. S. 270-278) Chief Justice FULLER says: "The settled rule is that the writ of habeas corpus cannot perform the office of a writ of error, and that, in extradition proceedings, if the committing magistrate has jurisdiction of the subject-matter and of the accused, and the offense charged is within the terms of the treaty of extradition, and the magistrate, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed on habeas corpus. (*Ornelas v. Ruiz*, 161 U. S. 502-508, and cases cited; *Bryant v. United States*, 167 U. S. 104.)" And again, he concludes by saying: "The decisions of the Executive Department in matters of extradition within its own sphere, and in accordance with the constitution, are not open to judicial revision; and it results that where proceedings for extradition, regularly and constitutionally taken under the acts of Congress, are pending, they cannot be put an end to by writs of habeas corpus." (See, also, *Matter of Clark*, 9 Wend. 212.)

In the case of *Roberts v. Reilly* (116 U. S. 80) we have a case in many respects very similar to the one under consideration. In that case the relator had been indicted in the state of New York for grand larceny. A requisition was made by the governor for his extradition from the state of Georgia. The governor of that state issued his warrant upon which he was arrested and held in custody. Habeas corpus was then issued by the District Court of the southern district of Georgia. The accused made an affidavit denying his guilt, and also denying that he was in the state of New York on the day laid in the indictment as the date of the offense; but he did not deny that he was in the state at about that date.

Mr. Justice MATTHEWS, in delivering the opinion of the

court, says with reference to the claim that the relator was not a fugitive from justice, "that it is a question of fact which the Governor of the state, upon whom the demand is made, must decide, upon such evidence as he may deem satisfactory.

* * * The determination of the fact by the Executive of the state in issuing his warrant of arrest upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof." The judgment of the Circuit Court, remanding the prisoner to the custody of the agent of the state of New York, was affirmed.. It will be observed that in that case the relator showed that he was not in the state at the date laid in the indictment; but this did not overcome the presumption of fact found by the governor, that he was a fugitive from justice.

Article 4, section 2, subdivision 2 of the Constitution of the United States provides that "a person charged in any state with treason, felony or other crime, who shall flee from justice, and be found in another state, shall, on demand of the Executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

The Revised Statutes of the United States, section 5278, provides that "whenever the Executive authority of any state or territory demands any person as a fugitive from justice of the Executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found, or of an affidavit made before a magistrate of any state or territory, charging the person demanded of having committed treason, felony, or other crime, certified as authentic by the Governor or chief of police of the state or territory from whence the person so charged has fled, it shall be the duty of the Executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause a notice of the arrest to be given to the Executive authority making such demand, or to the agent of such

authority appointed to receive the fugitive and to cause him to be delivered to such agent when he shall appear."

It will be observed that under the Constitution and statute, to which we have referred, the application must be made to the "Executive authority" of the state or territory to which the person charged with the crime has fled. The duty, therefore, devolves upon such executive authority to determine all the questions of fact which arise under the Constitution and statute. In this state the executive authority is vested in the governor. When the application was made for the arrest of the relator by the governor of Tennessee it became the duty of the governor of this state to determine: (1) Whether a crime under the laws of Tennessee was charged as having been committed by the relator. (2) Whether he was a fugitive from justice of that state. It appears that the governor has determined these questions from his recitals in the warrant. The first question was established by the production before him of the indictments found duly certified and authenticated, and the second by the indictments and other documents duly certified by the governor of the state of Tennessee to be authentic. Neither the Constitution nor the statutes make any provision for a review of the determination of the governor, but our own statutes give to every person deprived of his liberty the right to apply for a writ of habeas corpus, and in case he is imprisoned by virtue of a warrant of the executive, under a demand for extradition, section 827 of the Code of Criminal Procedure gives him the right to a review for the purpose of determining his identity, whether he is the person charged with crime under the demand for extradition. Under this writ the courts doubtless have the power to determine whether the executive has acted within the powers given him by the Constitution and statutes of the United States. When the papers upon which he has acted have been returned and become a part of the record in the proceedings upon habeas corpus, and it appears from such papers that no crime is charged as having been committed in the state demanding the return of the person, it has been held, though not without

criticism, that the court may discharge him (*People ex rel. Lawrence v. Brady*, 56 N. Y. 182), but where the papers upon which the governor has acted in making his determination to issue the warrant are not before the court, and the contents of such papers do not appear, the recitals of facts found by him, contained in the warrant, must be taken as true, so far as the review by habeas corpus is concerned.

The prevalence of crimes committed in one state by persons actually in another state, through innocent agents employed by them, such as the forwarding of forged drafts, checks and other instruments through the mails, express agencies or otherwise, for the purpose of procuring money or other property thereon, makes it desirable that the question should be determined as to whether, under the Constitution and statute of the United States, a person found in one state can be surrendered up, to be taken to another state for trial, for a crime committed therein, through some innocent agency of his, when he was only constructively present in the person of his agent. That question, however, ought to be determined by the Supreme Court of the United States. The conclusions reached upon the points above discussed render it unnecessary for this court to determine it in this case.

The order appealed from should be affirmed.

PARKER, Ch. J., GRAY and VANN, JJ., concur with CULLEN and O'BRIEN, JJ.; WERNER, J., concurs with HAIGHT, J.

Ordered accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
GEORGE A. SMITH, Appellant.

1. MURDER — TRIAL — FORMER JEOPARDY — QUESTION OF FACT. A plea of former jeopardy which fails to allege either a former conviction or a former acquittal as required by subdivision 4 of section 334 of the Code of Criminal Procedure, is insufficient and presents no issue of fact for the determination of a jury.

2. DISCHARGE OF JURY. The discharge of the jury and the postponement of the trial in a criminal action because of the illness of one of the

N. Y. Rep.]

Statement of case.

jurors incapacitating him from performing his duties are authorized by section 416 of the Code of Criminal Procedure, providing for the discharge of a sick juror and the impaneling of another jury then or afterward, and a plea of former jeopardy cannot be based upon such discharge and postponement.

3. **NEW TRIAL — ARREST OF JUDGMENT.** Motions for a new trial and in arrest of judgment made in a criminal action and based on a plea of former jeopardy are properly denied where there was neither a former conviction nor acquittal on the merits, but the former trial was terminated before verdict, by order of the court, because of the illness of a juror.

4. **EVIDENCE — FINDING OF WEAPON — COMPETENCY.** Evidence, in a trial for homicide, of finding upon the premises of the accused the frame of a revolver with which it was claimed the murder was committed and which was partially covered with black grease and emitted a smell of burnt powder from the barrel, together with testimony of the finding of the center pin and of several cartridges containing bullets similar to the one extracted from the head of the deceased, is competent, although the cylinder was not found and no direct proof made that there was a cylinder in the frame while it was in the possession of the accused.

5. **OPINION OF LAY WITNESS.** In a murder trial, upon the cross-examination of a witness for the prosecution who has testified to acts and conversations of the accused subsequent to the homicide, the court may properly exclude evidence as to whether the conduct of the accused seemed to the witness to be natural and genuine, when the opinion called for is not restricted to any particular act or acts testified to by him, and the witness is not shown to possess any superior knowledge on which to base an opinion.

6. **TESTIMONY UPON WHICH TO FORM A BASIS FOR CONJECTURE INADMISSIBLE.** On the trial of one charged with the shooting of his wife resulting in her death, testimony of a nurse as to the appearance, silence and demeanor of the wife when the accused came into the room where she was, as well as a statement concerning her subsequent physical condition and temperature, are inadmissible as a basis from which to draw conjectures as to the wife's belief in the guilt of the husband, whose innocence she had declared, where at the time the accused neither made any direct admission nor performed any act which could be regarded as an admission.

7. **WHEN SILENCE OF ACCUSED DOES NOT ESTABLISH ACQUIESCENCE.** That a husband under arrest on the charge of shooting his wife, whom he was permitted to see before her death, remained silent in her presence and did not ask her why she withdrew her hand, turned her head and refused to speak to or look at him, is not such an acquiescence in her conduct as to render testimony of her demeanor admissible, where she had persistently declared him to be innocent, was at the time in a semi-conscious and partially paralyzed condition, and he had been cautioned by her attendants to maintain silence and not disturb her.

8. **WHEN KNOWLEDGE AS TO IMPULSES OF DECEASED INADMISSIBLE.** It is error to permit a nurse who attended one fatally shot to state her knowledge of the impulses of the deceased when the latter withdrew her hand from that of the accused, her husband, who was permitted to see her, where such knowledge was based upon the looks of the deceased and what she subsequently said, with no proof as to what that statement was.

9. **APPEAL—REVERSIBLE ERROR.** The erroneous admission in a trial for homicide of evidence as to the silence of the accused while in the presence of the deceased before her death, and as to the demeanor of the latter, constitutes reversible error where the testimony was specially called to the attention of the jury in the charge of the court, and they were told that it might be considered by them in determining the defendant's guilt or innocence.

10. **ADMISSION.** Statements made by a husband, accused of killing his wife, to a witness, that although the latter had told him that his wife could not speak before her death, yet the witness was reported in a newspaper as having said that the deceased told her that the husband was guilty, do not constitute an admission by the accused of any fact material to the issue and are inadmissible.

11. **APPEAL—ERRONEOUS EVIDENCE—STRIKING OUT.** The erroneous admission of expert testimony is not cured by striking out all of it except such portions as bear upon specified subjects, where it is difficult if not impossible for the jury to determine what was stricken out and what remained; nor is the error cured by an offer of the court to strike out the entire evidence of the witness and permit him to be recalled when the proper foundation is laid.

12. **DYING DECLARATIONS—ADMISSIBILITY.** Dying declarations are shown to have been made under such a sense of impending death as will justify their admission in evidence where the fact is established by the declarations of the decedent, the testimony of the attending physicians and the circumstances showing the condition of the deceased and that it was realized by her.

13. **PREVIOUS OCCURRENCE.** Statements made by decedent as to an occurrence which transpired several hours before the homicide and which was an independent transaction not shown to have had any connection with the crime, are not admissible as dying declarations.

14. **APPEAL—REVERSIBLE ERROR.** The rejection of competent and material evidence or the reception of incompetent and improper evidence which is harmful to a defendant and excepted to presents error requiring reversal.

15. **BURDEN OF SHOWING IMPROPER EVIDENCE HARMLESS RESTS ON PROSECUTION.** The burden of showing on appeal in a criminal action that illegal and improper evidence received was harmful does not rest upon the accused, but the People must show that such evidence was harmless and could not have prejudiced him.

(Argued June 25, 1902; decided October 7, 1902.)

APPEAL from a judgment of the Supreme Court, rendered at a Trial Term for the county of Monroe November 10, 1898, upon a verdict convicting the defendant of the crime of murder in the first degree.

The facts, so far as material, are stated in the opinion.

George Raines for appellant. The court erred in overruling defendant's objections to the evidence of Emma Dabell of the acts and demeanor of Mrs. Smith at the silent interview of deceased and defendant, also in overruling defendant's motion to strike out the occurrence made as soon as it appeared not a word was spoken, also in denying defendant's motion to strike out the description of the acts and demeanor of Mrs. Smith, given by Miss Dabell, made at the close of all the evidence and not guarding defendant from them effectively on the trial, also in submitting her acts and demeanor to the jury by the charge. (*People v. Koerner*, 154 N. Y. 374; *Kelley v. People*, 55 N. Y. 565; *Child v. Grace*, 2 C. & P. 192; *Erben v. Lorillard*, 19 N. Y. 302; *Newman v. Goddard*, 3 Hun, 72; *Lanergan v. People*, 39 N. Y. 39; *Comm. v. Kenney*, 12 Metc. 235; *People v. Willett*, 92 N. Y. 29; *People v. Hoefelder*, 5 N. Y. Cr. Rep. 179.) The court erred in receiving and retaining under objection and exception the part of the conversation between Mrs. Bugbee and defendant, "I see by the newspapers that you said she told you that I did it." (*Stephens v. Vroman*, 16 N. Y. 384; *Reed v. McCord*, 160 N. Y. 341; *Sherman v. People*, 13 Hun, 577; *W. C. Co. v. Hathaway*, 18 Wend. 480; *Jenner v. Joliffe*, 6 Johns. 9; *Hasbrouck v. Weaver*, 10 Johns. 246; *Hubbard v. Brown*, 35 App. Div. 254; *Le Cour v. Importers' Bank*, 38 App. Div. 387; *Mayor, etc., v. Fay*, 53 Hun, 553; *Shaddock v. Town of Clifton*, 22 Wis. 114.) The court erred in its rulings that no witnesses upon the trial would be permitted to state whether the conduct, action and appearance of the defendant was genuine and not feigned. (*People v. Koerner*, 154 N. Y. 355; Whart. Cr. Ev. [8th. ed.] § 460; *De Witt v. Barly*, 17 N. Y. 340; *McKee v. Nelson*, 4 Cow.

356; *People v. Eastwood*, 14 N. Y. 562; *People v. Greenfield*, 85 N. Y. 82; *Mayor, etc., v. McCarthy*, 102 N. Y. 639; *People v. Cowley*, 83 N. Y. 464; *People v. Ruloff*, 45 N. Y. 213; *Blake v. People*, 73 N. Y. 586; *Doe v. Roe*, 32 Hun, 629.) The court erred in trying and deciding defendant's plea of former jeopardy without a jury; also in overruling defendant's plea of former jeopardy and in trying defendant; also in denying defendant's motion on arrest based thereon. The plea, if sustained on the merits, requires defendant's discharge. If it is held to be yet untried, a new trial must be awarded. (*People v. McGowan*, 17 Wend. 386; *Grant v. People*, 4 Park. Cr. Rep. 527; *People v. Olcott*, 2 Johns. Cas. 301; *People v. Goodwin*, 18 Johns. 187; *People v. Barrett*, 2 Caines, 308; *Cancemi v. People*, 18 N. Y. 129; *Mack v. People*, 82 N. Y. 235; *People v. Dowling*, 84 N. Y. 478; *Pierson v. People*, 79 N. Y. 429.) The court erred in permitting the possession of a cylinder for the revolver frame by defendant at the time of the homicide, fitting the revolver frame found in his tool house, to be proved by presumption from circumstances. (30 N. Y. 369; *Rex v. Millard*, R. & R. 244; Whart. Cr. Ev. [8th ed.] § 707; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *P. C. P. Ry. Co. v. Henrice*, 92 Penn. St. 433; *P. R. R. Co. v. Books*, 7 P. F. Smith, 339; *M. C. & C. Co. v. McEnnery*, 10 Norris, 185; *Douglass v. Mitchell*, 11 Casey, 443; *Reg. v. Wilson*, 8 Cox C. L. 38; *McAleer v. McMurray*, 58 Penn. St. 134; *Wheelton v. Hardisty*, 8 El. & Bl. 232; *Yates v. People*, 32 N. Y. 511.) The court erred in receiving the evidence of the witness Albert L. Hall as an alleged expert in the manufacture, uses and differences of pistols, cartridges, and the chemistry of burned powder and other substances; also in receiving large amounts of incompetent and speculative opinion and guesses from said witness on insufficient and incompetent bases, afterwards struck out without curing the errors committed; also, on striking out large portions of his testimony, in not properly advising the jury what portions were struck out or retained, so that neither jury nor counsel knew; also in permitting said witness to

give opinion upon matters strictly within the province of the jury to determine, and in receiving for five days large amounts of incompetent evidence prejudicial to defendant from this witness. (*People v. Rice*, 159 N. Y. 400; *People v. Wilson*, 3 Park. 206; *People v. Williams*, 29 Hun, 524; *Furst v. S. A. R. R. Co.*, 72 N. Y. 542; *People v. Zimmerman*, 4 N. Y. Cr. Rep. 274; *Erben v. Lorillard*, 19 N. Y. 302; *Coleman v. People*, 58 N. Y. 561; *Anderson v. R., W. & O. R. R. Co.*, 54 N. Y. 341; *Stokes v. People*, 53 N. Y. 184.) The court erred in receiving dying declarations on the preliminary proof; also in permitting in evidence declarations of the occurrence at twelve o'clock of getting up and lighting the lamp as not part of the *res gestæ*; also in many rulings during the proof of dying declarations, and in the charge to the jury. (*People v. Smith*, 104 N. Y. 501; *Rex v. Mead*, 2 B. & A. 605; Greenl. on Ev. § 156; *People v. Davis*, 56 N. Y. 95; *Ins. Co. v. Mosey*, 8 Wall. 397; *Lambert v. State*, 23 Miss. 323; *Waldele v. N. Y. C. & H. R. R. R. Co.*, 95 N. Y. 275; *Chapin v. Marlborough*, 9 Gray, 244; *Rockwell v. Taylor*, 41 Conn. 59; *Tesley v. J. & R. R. Co.*, 17 N. Y. 131; *State v. Davidson*, 30 Vt. 377.) The court erred in receiving in evidence the strings found in the new house on the afternoon following the homicide for the reason that they first came to the new house that afternoon and were not proved to be in the possession of defendant nor accessible to him previously; also in numerous rulings admitting hearsay evidence, remote and incompetent and irrelevant with regard to the same strings and other strings. (*Dubois v. Raker*, 30 N. Y. 369.)

Stephen J. Warren for respondent. It was not error for the trial court to admit the evidence of Sarah Hughes and Emma Dabell on the subject of Mrs. Smith's conduct in the presence of the accused. This evidence was competent not only as bearing upon and affecting the demeanor of the accused, but as showing the relations and feelings the accused and his wife bore towards each other; nor did the court err in receiv-

ing in evidence testimony of Emily Bugbee that the defendant said to her: "I see by the newspaper that you said she told you I did it. Now, you help me all you can, I will do well by you, I have got lots of money." (*Kelley v. People*, 55 N. Y. 565; *People v. Conroy*, 97 N. Y. 62; *Greenfield v. People*, 85 N. Y. 75; *Lindsay v. People*, 63 N. Y. 143; *People v. Place*, 157 N. Y. 584; *People v. Wennerholm*, 166 N. Y. 567; *People v. O'Neil*, 112 N. Y. 355; *Hendrickson v. People*, 10 N. Y. 13.) The court did not err in refusing to receive in evidence the opinions of lay witnesses as to whether or not the conduct of the defendant seemed real and genuine. (*People v. Koerner*, 154 N. Y. 363; *Payne v. Aldrich*, 133 N. Y. 544; *People v. Wright*, 136 N. Y. 625; *De Witt v. Barly*, 17 N. Y. 340; *Kennedy v. People*, 39 N. Y. 245; *Messner v. People*, 45 N. Y. 1.) It was not error for the trial court upon conceded facts to decide without a jury defendant's plea of former jeopardy, nor did the court err in discharging the first jury by reason of the illness of one of their number. (Code Crim. Pro. §§ 332, 334, 340, 341, 354; *Comm. v. Felle*, 9 Leigh, 613; *U. S. v. Haskel*, 4 Wash. C. C. 402; *Comm. v. Cook*, 6 S. & R. 578; *People v. Raegle*, 60 Barb. 527; *Cancemi v. People*, 18 N. Y. 128; *People v. Olcott*, 2 Johns. Cas. 300; *Canter v. People*, 38 How. Pr. 91.) The trial court did not err in receiving in evidence testimony as to the condition of the revolver frame and cylinder pin, indicating that the revolver had been recently fired, nor in receiving testimony to the effect that the bullet found in deceased's head corresponded with the bullets in the four cartridges found near the revolver; nor did the court err in submitting to the jury for their consideration the condition of the revolver frame as bearing upon the question whether or not there was a cylinder in the frame at the time it was discharged. (*Greenfield v. People*, 85 N. Y. 75; *People v. Neufeld*, 165 N. Y. 43; *People v. Wennerholm*, 166 N. Y. 567; *People v. Harris*, 136 N. Y. 423; *People v. Johnson*, 140 N. Y. 350.) If it was error to receive in evidence testimony of the witness Hall as an expert, the error was cured when such evi-

N. Y. Rep.] Opinion of the Court, per MARTIN, J.

dence was stricken from the record and the jury directed to disregard it. (*Greenfield v. People*, 85 N. Y. 75; *People v. Wilson*, 141 N. Y. 185; *People v. Schooley*, 149 N. Y. 99; *Gall v. Gall*, 114 N. Y. 109; *Holmes v. Moffat*, 120 N. Y. 159.) The court did not err in receiving in evidence the dying declarations on the preliminary proof, nor in permitting in evidence declarations of the occurrence at twelve o'clock, of getting up and lighting the lamp as part of the *res gestæ*, nor in its rulings during proof of dying declarations, nor in its charge to the jury. (*Hackett v. People*, 54 Barb. 372; *People v. Shaw*, 63 N. Y. 36; *Brotherton v. People*, 75 N. Y. 159; *People v. Kraft*, 148 N. Y. 631; Underhill on Crim. Ev. 138, § 109; Stephen's Dig. of Ev. 134; Reynolds on Ev. 50; *People v. Corey*, 157 N. Y. 332; *People v. Smith*, 104 N. Y. 491.) The court did not err in its charge in regard to absence of proof of motive. (*People v. Ferraro*, 161 N. Y. 365; *People v. Sutherland*, 154 N. Y. 345; *People v. Johnson*, 139 N. Y. 358; *People v. Scott*, 153 N. Y. 40.)

MARTIN, J. On the morning of September 9, 1897, at Churchville in the county of Monroe, a most horrible tragedy occurred. The victim was the defendant's wife. On the following morning the defendant was arrested and charged with having caused her death. In November, 1897, he was indicted for the crime of murder in the first degree, was subsequently tried, and on November 4, 1898, was convicted of the crime charged. On November tenth he was sentenced to be executed in the manner provided by law. At the time of the homicide the defendant was sixty-three years of age and his wife sixty-one. They had been married forty-three years and had two adult sons who were also married, one living at Churchville and the other at Omaha. The defendant claimed that on the morning of the homicide two burglars entered his house, robbed him of his money and shot his wife because she attempted to give an alarm. Her death was not immediate, but occurred five days later from the effects of a pistol wound in the head inflicted at the time of the tragedy. At that time

the occupants of the house were the defendant, his wife, Grant Walker, her nephew, and Miss New, a nurse attending him. Walker and the nurse occupied a bedroom and hall directly over the room where the defendant and his wife slept, but they heard no shot although the nurse was giving medicine on the hour and between hours passed up and down stairs. The defendant and his wife occupied the same bed, having retired about ten o'clock on the previous night. At twelve o'clock they both arose but soon retired again. Shortly before three o'clock, Dr. Van Horn, a neighbor, heard the report of a pistol in the direction of the defendant's house, but it was heard by no one else. At about three o'clock the nurse was aroused, but what awakened her she was unable to state. Upon awakening she heard groaning, went to her patient, found him sleeping, and then concluded that it was below and that it was the defendant. She did not go to the room where he was until about four o'clock and in the meantime the groaning continued, but she heard no other sound except after three o'clock she heard the shutting of a door which she could not locate. When, finally, she went below, she found the defendant in the dining room fastened with ropes to the leg of an oak dining table, with his legs bound, his hands tied behind him and a gag in his mouth. She asked him if he was sick and he replied, "They bound me, let me loose." She at once summoned the neighbors. Upon her return she went to the bedroom occupied by the defendant and his wife, saw blood on the decedent's face and on the sheets, and asked her what had happened. She did not reply but inquired for the defendant. The neighbors soon reached the house. One of them cut the cords with which the defendant was bound and raised him from the floor, when he at once stated that two masked burglars had entered the room occupied by himself and wife, dragged him from the bed, compelled him to disclose where his money was hidden, which they took, and then bound, gagged and left him in the condition in which he was found. He was partly dressed, having on trousers, a night shirt, a pair of socks and

N. Y. Rep.] Opinion of the Court, per MARTIN, J.

suspenders over his shoulders. The table to which he was fastened was an ordinary dining table, upon which were the dishes ordinarily used for meals. He described the burglars as one being tall, the other short, as wearing white masks and moccasins and as carrying shining revolvers. He also stated that they kicked, pounded and sandbagged him; that he heard the discharge of a gun in the room then occupied by his wife, who cried "Murder," and that that was why they shot her; that after the gun went off the burglars said it went off accidentally; that they then left the house, one of them, at least, going through a window on the south side. A physician who examined Mrs. Smith found a wound in her ear and powder marks in and around it. Between seven and nine o'clock that morning an officer procured from the defendant a revolver, but it was conceded that it was not the revolver used in the commission of the homicide. Between eight and nine o'clock Mrs. Smith was examined by physicians present, who announced that she would die from her injuries. The defendant was informed of the result of the examination and that his wife desired to see him, to which he replied, "I can't now." Subsequently during that morning the dying statements of Mrs. Smith were taken, which were in substance that she was obliged to get up at about twelve o'clock; the defendant got up at the same time, struck a match and lighted a lamp; before she was hit she saw no one and heard nothing, but felt a hard blow upon the side of her head; no one held a gun to her head and threatened her, and she did not know who hit her. Her statement was not signed except by the witnesses and was rejected at the trial as incompetent, but its substance was proved by witnesses who were present when it was taken. At the time it was made the decedent was in a drowsy stupor or partial coma, and had to be aroused when questions were asked and she answered them only by Yes or No. The premises where the homicide occurred were searched by officers, who found pieces of rope and cord which were proved to be similar to those with which the defendant was bound. A revolver frame without a cylinder and also

the center pin were found in a building upon the premises, and in the same building were found several cartridges, the bullets in which were proved to be similar to that extracted from the decedent's head. The cylinder belonging to the revolver frame was never discovered, although a most thorough search was made of the entire locality. Until her death the decedent persistently asserted that she did not know who shot her, but that the defendant did not. She passed through increasing symptoms of stupor until absolute coma set in on the following Monday which resulted in her death in the evening of that day. The defendant asserted that he was seriously injured and that the burglars had struck him in the chest, knocked him down and tied him. He groaned and complained so loudly that he was asked to keep quiet both by the physicians and nurses in attendance. Subsequently the physicians removed his shirt, examined his chest, abdomen and hip where he claimed to have been injured, but no indications of external bruises or injuries were found. Proof was given that there was dust on the window sill that appeared to be undisturbed, which tended to show that no one had passed through the window by which the defendant claimed that at least one of the burglars had escaped. When asked if he made an outcry, he replied, "No, there was no need of doing that." There was also proof that where he said the box that contained his money was hidden there was dust, but that it was undisturbed, thus indicating that his statement in that respect was also untrue. Other proof was given tending to show that different statements made by the defendant were inconsistent, and that his original statement was false. There was some evidence tending to show that the relations between the defendant and his wife had at times been unpleasant, although there was other proof that their relations were most friendly. There were two life insurance policies of one thousand dollars each upon the life of the decedent which had been assigned to the defendant.

On June 13, 1898, the defendant was arraigned, pleaded not guilty, and the trial was commenced and continued until

the twenty-eighth day of that month. During that time a jury was selected and considerable evidence was taken in favor of the prosecution. One of the jurors subsequently became ill, on account of which the trial was adjourned from day to day from June twenty-eighth until July second, 1898, when, upon filing a physician's certificate that the juror could not, without serious risk to his health and life, continue his duties, the court discharged the jury and ordered the trial postponed. The defendant objected to their discharge, demanded the selection of a new juror in place of the one who was ill, and that the trial proceed. The court declined to comply with his demand, and the trial was postponed until the nineteenth of September, when it was again commenced. On that day, before a jury was called, the defendant claims to have pleaded former trial and jeopardy in bar of any further trial of the indictment against him. This was overruled, the defendant excepted and the trial proceeded. On the fourth of November the defendant was convicted of murder in the first degree, and on the tenth day of the same month a motion for a new trial was made and denied. Upon his alleged plea of jeopardy the defendant also moved in arrest of judgment, which was denied, and the defendant was duly sentenced. The defendant's plea of former trial was based upon or consisted of a written application which set forth the facts in relation to his indictment, his plea of not guilty, the commencement of the trial, its continuance for several days, the illness of a juror, the discharge of the jury by the court on account of such illness, the postponement of the trial, and all the facts attending the action of the court in that respect, and alleged that such postponement was unnecessary, and by reason of the facts thus stated the defendant had been placed in jeopardy of his life and liberty, and could not a second time be placed on trial.

On the trial the People called Emma G. Dabell as a witness, who testified that she was a nurse and attended Mrs. Smith in her last illness; that on Saturday morning about ten o'clock the defendant was at the house, asked to see his wife,

went into her room, followed by Mr. Hawley, an officer having him in custody, passed to the east side of the bed near Mrs. Smith's pillow, and that she observed what she did at the time. The witness was then asked: "What was the first thing you observed of her?" This was objected to by the defendant as incompetent and immaterial. The district attorney then said: "Not anything that was said?" to which the court replied: "If she said anything in his presence it would be competent. If it was in his presence I think it was competent." The defendant's counsel again objected to this evidence as incompetent, immaterial and as partaking of the nature of a dying declaration, for which no foundation had been laid. Overruled. Exception. Then followed the question: "What was the first thing that you observed of Mrs. Smith? A. As Mr. Smith passed by me to take a seat, she gave a start. Q. Anything else that you can describe? A. Only that she looked at him. Q. Did you observe her countenance at that time? A. Yes, sir; it changed. Q. Go right on; anything else that you observed?" The defendant objected to the characterization of the appearance by the witness. Overruled. Exception. "And you say she looked at him? A. Yes, sir; and she looked at him, and Mr. Smith put his hand out on the hand that Mrs. Smith had lying on the outside of the bed clothes, and she drew it away, and he sat there and dropped his head and wiped his face with his handkerchief, and she looked at him and he did not look at her, and when he again looked up he looked out of the window, and he sat there for, perhaps, just guessing at the time, I should think, perhaps it was five or six minutes. Mr. Hawley said, 'Come, Mr. Smith,' and they got up and went out. Q. Was there a word spoken between them there? A. Not a word." The defendant's counsel then moved to strike out the occurrence as immaterial, irrelevant and incompetent. Denied. Exception. This witness likewise testified that she saw the defendant there again after that on Saturday afternoon and Monday morning; that he was in company with the same officer; he came into the room, asked to see his wife,

went in and sat a few minutes by the side of the bed, but said nothing and wiped off his face with his handkerchief and went out. Then followed the question: "Now you may describe anything that you observed about Mrs. Smith then, as to what she did?" Objected to as incompetent and immaterial. Overruled. Exception. "Or anything that she didn't do, either one? A. She did not appear to see him. Q. Did she look at him on that occasion? A. No, sir. Q. Did he touch her in any way or say anything to her? A. No, sir. Q. About how long was he in the room then? A. Perhaps three or four minutes." The witness also testified to his being there on Monday morning, and was asked, "Did he speak to Mrs. Smith on that occasion? A. He did not. Q. Did Mrs. Smith speak to him on that occasion? A. No, sir. Q. What was there with reference to her appearance; do you know whether or not she saw him on that occasion?" Objected to by the defendant as incompetent and immaterial. "The Court: She may state whether she looked at him. A. She did not." Upon the cross-examination of this witness she was asked: "You have no way of knowing what the sick woman's impulse came from at the time that she drew her hand towards her, have you? A. Only as I might judge from the expression of her face and what she said to me afterwards." The defendant moved to strike out "what she said to me afterwards." Denied. Exception. On the re-direct examination the attention of this witness was called to the first interview, and this question was asked: "Soon after Mr. Smith left that room did you observe any indications of choking or coldness?" This was objected to as incompetent and purely speculative. Overruled. Exception. "Now, then, give us what your recollection is and what was the first thing that indicated to you any such condition?" Objected to as incompetent and immaterial. Overruled. Exception. "Mrs. Smith did not swallow very well and her throat seemed to fill up with mucus. She made an effort to raise the mucus and I assisted her, and then she complained of being cold, and her feet, her extremities were cold. Q. About how long

after Mr. Smith had been there on that occasion did you first notice those things?" Objected to as incompetent, immaterial and speculative. Overruled. Exception. "A. Within an hour. Q. Did Smith shed any tears on that occasion?" Objected to as incompetent and immaterial. Overruled. Exception. "A. He did not."

Sarah Hughes was also called as a witness for the People and testified that she saw the defendant there on Thursday, saw him go into Mrs. Smith's room; Mrs. Smith was lying on her back on the west side of the bed, and that Mr. Townsend had been there at that time and she had heard a statement that had been taken before. She was then asked: "You may just describe Smith's appearance and his going into that room, and what he did and how long he was there, and all about it, in your own way." The defendant's counsel objected to anything being narrated which was made up of Mrs. Smith's acts or demeanor while Smith was in the room, anything of any statement on that subject in reply to this question. "The Court: I am inclined to think that anything that was said between these parties, as to the homicide or the shooting, is competent." Exception. "I object to her acts and demeanor, and I take a separate objection to what she said. The Court: This is not received for the purpose of establishing her dying declarations, but as against him, anything that may have been done or said at that time." Exception. "A. He entered the room from the parlor with his handkerchief over his face, went to the side of the bed and stooped over Mrs. Smith, putting his hands one on each side of her as she lay on the bed, and put his cheek down near hers. He raised his head and spoke to her and she replied. He raised himself to an erect position, turned around and left the room. Q. What was her act?" The defendant objected as incompetent and on same grounds as to the previous question to her acts. "The Court: Describe nothing that took place when he left, but what she did in his presence." Exception. "The Court: Was this while he was looking at her? A. Yes, sir. The Court: She may state what she did

N. Y. Rep.] Opinion of the Court, per MARTIN, J.

and said, if anything, in his presence." Exception. "A. She turned her face away from him. * * * Q. Just illustrate to the jury the motion of her face at that time or her head at that time?" The question and her acts were objected to as incompetent. "The Court: State what he said, if anything, and what she said and what she did." Exception. "A. She turned her face on the pillow away from him, like that." The witness was also permitted to testify under the defendant's objection and exception that he said about six words and that he was there not to exceed a minute from the time he entered the bedroom until he went out. She did not hear the words that passed between them, except that when the defendant came into the room he said, "My wife, my wife!"

At the close of the evidence the defendant again moved to strike out the evidence of the witness Dabell with regard to the acts and demeanor of Mrs. Smith and also the evidence of the witness Hughes to the same effect. These motions were each denied and the defendant again moved to strike out the parts of that evidence which related to the acts and demeanor of Mrs. Smith and limited his motion to that part of the transaction. To the denial of each of these motions separate exceptions were taken.

The witness Emily Bugbee was permitted, under the objection and exception of the defendant, to testify to a conversation with him as follows: "What did he say? A. He said, 'Don't you remember you told me she couldn't speak, she couldn't talk,' and he said, 'I see by the newspaper that you said she told you that I did it.'" This was objected to by the defendant as incompetent, immaterial and irrelevant. Overruled. Exception. The witness then continued: "He says, 'You must have misunderstood her. She must have been calling for me, for George, saying, 'Where is George?'" That a part of the conversation which occurred at this time was admissible is not denied, but it was to the portion above quoted that the defendant objected, and upon his exceptions to its admission he now relies.

A careful reading of the evidence has satisfied us that it

was sufficient to authorize the submission of the case to the jury and to justify its verdict. We are not satisfied that the verdict was so far against the weight of evidence or against law as to justify us in granting a new trial unless the exceptions of the defendant require it. Therefore, the only questions that need be considered upon this appeal are those presented by such exceptions.

First. The appellant contends that the court erred in deciding his alleged plea of former jeopardy without submitting it to a jury, and in denying his motions based thereon for a new trial and in arrest of judgment. The facts upon which these applications were founded were obviously conceded, and the court denied them upon the ground that, as a matter of law, the facts stated were insufficient to sustain such applications or to prevent a further trial of the indictment. If the alleged plea appeared on its face to be wholly insufficient, the question of former jeopardy was not required to be submitted to the jury. (Abbott's Trial Brief [Crim.], § 127.) The validity of the appellant's exceptions to these rulings must be determined in the light of the provisions of the Code of Criminal Procedure, as that act applies to all criminal actions and other proceedings in criminal cases from the time when it went into effect. (Code Crim. Pro. § 962.) Its provisions, so far as applicable to the question under consideration, are to the effect that no person shall be subjected to a second prosecution for a crime for which he has been duly convicted or acquitted; that a plea of former conviction or acquittal may be pleaded either with or without the plea of not guilty by the defendant's alleging "that he has already been convicted (or acquitted, as the case may be) of the crime charged in this indictment, by the judgment of the court," naming it and naming the place and date of such conviction. It also provides that issues of fact shall be submitted to a jury; that questions of law shall be decided by the court, and expressly provides that "If, before the conclusion of the trial, a juror becomes sick, so as to be unable to perform his duty, the court may order him to be discharged and another jury to be

N. Y. Rep.] Opinion of the Court, per MARTIN, J.

then or afterwards impaneled." (§§ 9, 332, 334, subd. 4, 355, 416, 417.) It is obvious that under these provisions of the statute, upon being satisfied that one of the jurors was sick and unable to perform his duty, the trial court was authorized to order him discharged and to then or subsequently impanel another jury to try the indictment herein. The sickness of one of the jurors originally impaneled was the sole ground upon which the jury was discharged and the trial postponed. Under these circumstances, a plea of former acquittal or conviction could not be properly interposed. A former conviction or acquittal which may be pleaded in bar is a conviction or acquittal on the merits. (*Canter v. People*, 1 Abb. Ct. App. Dec. 305, 308; 2 R. S. 701, §§ 24, 25; Code Crim. Pro. §§ 340, 341.)

Moreover, the alleged plea in this case was not in form or in substance as required by the Code. (§§ 332, 334, subdiv. 4.) It contained no allegations either of a former conviction or of a former acquittal, and, consequently, under the requirements of the Code, no issue of fact was presented for the determination of a jury. (*People v. Cignarale*, 110 N. Y. 23, 29.) If the application of the defendant properly presented any question for determination by either the court or the jury, it was plainly a question of law which the court was required to decide. (Code, § 417.) It could not be said that the defendant had been put in jeopardy as he had not been tried, and no jury had passed upon the merits of the case. (*People v. Barrett and Ward*, 1 Johns. 66, 69; *People v. Goodwin*, 18 Johns. 187, 203; *People v. Reagle*, 60 Barb. 527, 544.) It has long been a part of our established jurisprudence that where a trial, before a verdict is rendered, is terminated by an order of the court either on account of the illness of a juror or for any other sufficient cause, a new jury may be impaneled and the indictment tried, and a former partial trial thus terminated constitutes neither a conviction nor an acquittal. (*People v. Casborus*, 13 Johns. 351; *People v. Green*, 13 Wend., 57; *People v. Olcott*, 2 Johns. Cases, 301, 306; *People v. Cignarale*, 110 N. Y. 23; *Commonwealth v. McCormick*, 130 Mass.

61, 62.) We are, therefore, of the opinion that the court properly disposed of the defendant's applications and motions, and that its rulings in that respect constituted no error.

Second. The defendant also contends that the court erred in admitting proof of the finding of the revolver frame, that it was partially covered with black grease and emitted a smell of burning powder from the barrel, the finding of the center pin and of several cartridges on the defendant's premises containing bullets similar to the one extracted from the decedent's head, and upon the proof and the circumstances connected therewith in submitting to the jury whether they were portions of the revolver with which the crime was committed, although the cylinder was never found and there was no direct proof that there was a cylinder in the frame while it was in the possession of the defendant. We do not think this contention can be upheld. Although to prove a fact by circumstances the circumstances themselves must be established by direct proof and not left to inference, yet it does not follow that all the circumstances which were established upon the trial by direct evidence, from which it might be inferred that the defendant employed the portions of the revolver found in the commission of the offense with which he was charged, should have been entirely disregarded and withdrawn from the consideration of the jury, simply because the cylinder was not found, especially in view of the other proof in the case and of the fact that the account which the defendant gave as to the revolver and other matters relating to the homicide was shown to have been exceedingly improbable if not absolutely untrue. The absence of that proof merely affected its potency and the weight which was to be given to it by the jury, but did not reach the question of its competency. (*People v. Neufeld*, 165 N. Y. 43, 47; *People v. Wennerholm*, 166 N. Y. 567, 573; *Greenfield v. People*, 85 N. Y. 75, 82.)

Third. A witness for the prosecution testified to some of the acts and conversations of the defendant under certain conditions which arose subsequently to the homicide. Upon

N. Y. Rep.] Opinion of the Court, per MARTIN, J.

her cross-examination she stated that she could not remember the details of the conversation to which her attention was called, whereupon the defendant's counsel asked the following question: "At the time did his conduct seem to you to be natural and genuine?" This was objected to, the objection was sustained, and the defendant excepted. He now insists that the court erred in sustaining that objection. It may be that upon cross-examination the court might, in its discretion, have permitted the witness to answer, but was it required to do so is the question here presented. Obviously the witness was not an expert or introduced as such, so that the broad question is whether a lay witness, after partially describing the acts and conversations of a party, must be permitted to testify whether or not his conduct seemed to the witness to be natural and genuine. There may be instances where the circumstances are peculiar and such that a lay witness may be permitted to testify that in his opinion certain described acts seemed natural or otherwise, if that is the only manner in which the fact can be proved or determined and it depends upon a variety of circumstances or a combination of minute appearances, impossible to describe, so that a jury would be able to decide the question. Obviously no such question was presented by the ruling under consideration. The question objected to and excluded did not call for an opinion as to whether any specified act or acts were natural or otherwise, but whether the general conduct of the defendant at the time, without any limitation to the acts or conversations proved, was assumed or genuine, natural or unnatural. No such question would be allowed even upon an issue of imbecility, idiocy or insanity, where the rule has been extended to its fullest limit. Moreover, the witness was not shown to be competent to give an opinion upon that question. There was no evidence showing that she possessed any superior knowledge by reason of which she could have judged of the character of his acts any more correctly than the jury, so that under the circumstances the question in effect called for the conjecture of the witness rather than for her opinion based

upon any knowledge she was shown to have possessed. Whether he was simulating pain or feigning sorrow was not a fact as to which she could testify. She was not shown to have had any previous knowledge of his habits or disposition which rendered her competent to give an opinion upon that subject. If she had been interrogated as to his usual manner, his disposition, nervousness, excitability, whether demonstrative under great or slight provocation, his mode of expression when excited, whether extravagant or otherwise, so far as they had been observed by her, all the facts within her knowledge bearing upon the question would have been placed before the jury that could have been competently established by her. The question whether at that time the general conduct of the defendant was natural and genuine did not call for proof of any fact within her knowledge or of which she was shown competent to speak. Whether his conduct was natural and genuine could be determined only by a person who had known the defendant with sufficient intimacy to become familiarly acquainted with his natural acts and conduct, and it then involved a comparison of his conduct at the time with that which the witness had formerly observed. This witness was not shown to possess any such familiarity as to render her competent to answer the question, even if it was otherwise admissible. If she had been qualified and the question had been whether some particular act testified to by her impressed her as natural or otherwise, quite another question would have been presented. The general rule is that a witness must state facts and not opinions. To this rule there are certain exceptions. But the question asked by the defendant's counsel does not fall within any of those exceptions. Even in cases where the question of mental soundness or insanity is involved, a lay witness cannot properly give an opinion as to the mental capacity of the person, but at most can give an impression as to whether the acts observed by him were rational or irrational. (*People v. Rector*, 19 Wend. 569, 574; *People v. Bodine*, 1 Denio, 281, 311; *Kennedy v. People*, 39 N. Y. 245, 257; *Messner v.*

N. Y. Rep.] Opinion of the Court, per MARTIN, J.

People, 45 N. Y. 1, 4; *Van Zandt v. Mut. Ben. L. Ins. Co.*, 55 N. Y. 169, 179; *People v. Wright*, 136 N. Y. 625, 629.) Without further discussion of this question, we are of the opinion that the court properly excluded this evidence, and that there was no error in its rulings in that respect.

Fourth. The appellant also claims that the court erred in admitting the testimony of the witnesses Dabell and Hughes under his objections and exceptions as to the appearance, silence, acts, movements, demeanor, temperature and physical condition of the decedent, what she did and what she did not do while in the presence of the defendant, although he said nothing and performed no act which in any way tended to inculcate him by admission or otherwise. By these rulings the court, in purpose and effect, admitted proof to establish the imagined or conjectured impulses of the decedent, as evinced by her looks, her change of countenance, and by her subsequent unproved declarations, as well as the condition and temperature of her body after a meeting between her and the defendant. It also admitted the evidence of the witness Emily Bugbee of the alleged statements of the defendant, not amounting to or including an admission of any fact relating to the homicide, but which related only to a mere newspaper report, apparently inspired by the witness, to the effect that, although she had informed the defendant that the decedent could not talk, she had said to a newspaper reporter that the decedent had declared that he (the defendant) did it, and to which he added that she must have been mistaken as his wife must have been calling for him. We are aware of no rule of evidence under which this proof was properly admissible. The learned trial judge was obviously of the opinion that the presence of the defendant rendered proof of everything that occurred or did not occur absolutely admissible, without regard to its character, by whom it was said, done or omitted, or to the circumstances or conditions under which the acts or omissions of the decedent or of the defendant occurred. In that, we think, he was in error. The practical effect of his rulings was to allow the prosecution to place before the jury

the observed or imagined condition, appearance, movements, conduct and demeanor of the decedent from which to conjecture a mental condition of which there was not only no valid proof, but which, when proved, had no proper bearing upon the questions at issue. The possible and intended, if not the probable and natural effect of that evidence was to induce the jury, notwithstanding her positive denial, to believe that the decedent was of the opinion that the defendant committed the offense of which he was charged. The issue was not what the decedent may have thought or believed, but whether the defendant committed the offense. This evidence was inadmissible, not only because it was an attempt to prove a mere unsubstantiated conjecture as to a matter of which neither the witness nor the jury had any knowledge, but also for the reason that the decedent's belief was wholly incompetent and immaterial. That during the occurrences to which this evidence related the defendant made any actual admission, direct or indirect, of any fact material to the issue, cannot be even pretended. Nor did he perform any act that could be regarded as an admission of any such fact, unless his silence constituted such an admission.

The only possible ground upon which the silence of a party can be admitted as evidence against him is that it amounts to an acquiescence in a statement or act of another person. The rule admitting such evidence is to be applied with careful discrimination. Such evidence is most dangerous and should be received with great caution, and not admitted unless of statements or acts which naturally call for contradiction, or unless it consists of some assertion with respect to his rights in which, by silence, the party plainly acquiesces. To have that effect, his acquiescence must be exhibited by some act of voluntary demeanor or conduct. If the claimed acquiescence is in the conduct or language of another, it must plainly appear that such conduct or language was fully known and fully understood by the party before any inference can be drawn from his passiveness or silence. The circumstances must not only be such as to afford him an opportunity to act

N. Y. Rep.]

Opinion of the Court, per MARTIN, J.

or speak, but such as would ordinarily and naturally call for some action or reply from persons similarly situated. If the condition be one of doubt as to whether a reply should have been made, the evidence should not be received. Declarations or acts made or performed in the presence of a party, when received in evidence, are received not as evidence in themselves, but in a proper case and under proper circumstances and conditions they may be admitted to ascertain what the party to be affected said or did, but he is not to be prejudiced by the statements or acts of another in his presence, although silent, unless the statements or acts are such as to call for some response or act upon his part. (*People v. Koerner*, 154 N. Y. 355, 374; *Lanergan v. People*, 39 N. Y. 39; *Kelley v. People*, 55 N. Y. 565, 572; *People v. Willett*, 92 N. Y. 29; *Wright v. People*, 1 N. Y. Crim. Rep. 462.)

Thus the question is presented whether, under the circumstances existing at each of the defendant's visits to the bedside of his wife, of which evidence of his silence was given, it can be properly held that he thereby acquiesced in any act or acts of the decedent which had any prohibitive bearing upon the issue. Thus we are led to inquire in what can it be properly said that he acquiesced? Nothing was said to which any reply could have been made. Nor do we think there was any act of the decedent which, under the circumstances proved, demanded action or remark upon the part of the defendant to avoid acquiescence therein. What should he have done? With no proof that the defendant observed these things, was he required to interrogate her as to her change of countenance, as to the reason why she withdrew her hand, why she did not speak to him, or look at him, or why she turned her head, or be bound by the conjecture of a jury as to what impelled such acts upon her part, although, under the proof, they may have been wholly involuntary? We think not. She being at most only semi-conscious, he was not required to, nor could he properly, speak of or criticise her conduct, even if it was as testified to and was observed by him. But there was no proof that he observed any peculiar action or conduct upon her part,

or anything in the nature of an accusation by her. In view of the fact that she persistently declared him to be innocent, naturally he would not anticipate or observe an accusation in anything that she was proved to have done or omitted. It is also to be remembered that the defendant had been frequently enjoined by the physicians and nurses in attendance to maintain silence, and not to disturb the decedent when in her presence; that the decedent, when approached by her physicians or nurses and her wrist was touched, would not only make a convulsive movement of her hand, but would turn over on her left side with her face to the opposite wall; that she was partially paralyzed, and, as a consequence, her speech was essentially impaired and difficult to understand; that her face was thereby distorted, and that the defendant was upon each of the occasions when he visited her room in the immediate custody of an officer who controlled his coming and departure. In view of the fatal illness of his wife and of the positive injunctions of silence by her physicians and nurses, his omission to speak in her presence certainly could not be properly regarded as an acquiescence by him in anything she was proved to have done or omitted. Moreover, he was at the time under arrest and in the custody of an officer, and might well have been silent without its being regarded as an acquiescence in any act proved to have been performed. (*Commonwealth v. McDermott*, 123 Mass. 440; *State v. Diskin*, 44 Am. Rep. 449.) We think the court erred in admitting much of this evidence, and also in permitting the witness Dabell to state her knowledge of the impulses of the decedent when she withdrew her hand, from her looks and from what she subsequently said, with no proof as to what that statement was. The only remaining question in respect to those rulings is whether they constituted such errors as require a reversal. Had that evidence been casually or incidentally admitted, and no particular force or effect given to it by the court or jury, we might perhaps be justified, under section 542 of the Code of Criminal Procedure, in disregarding the errors in its admission as not having affected the substantial rights

N. Y. Rep.] Opinion of the Court, per MARTIN, J.

of the defendant. But that is not the situation. In submitting the case to the jury the learned trial judge not only instructed them that they might consider the dying declarations of the decedent, but in effect charged that they might disregard her statement that the offense was not committed by her husband. Upon that question the jury were told that they might consider the action and conduct of the defendant in the presence of his wife. Their attention was also expressly called to the testimony of the witnesses Dabell and Hughes, and they were informed that they had the right to draw such inferences from his acts and conduct upon those occasions as they thought proper. That portion of the charge which submitted to the jury the question whether the decedent knew who committed the crime when she was asked if George did it was excepted to by the defendant. The court then said: "That is a question for you, gentlemen." Thus the court submitted to the jury the question whether Mrs. Smith knew that the defendant committed the homicide. Her knowledge was unimportant as bearing upon the main issue, and, hence, for that purpose proof of it was inadmissible. Moreover, it is obvious that the evidence submitted to the jury, upon which they were instructed that they might find that she knew that her husband did it, was improperly received. The defendant also expressly excepted to the charge as to the incidents testified to by the witnesses Hughes and Dabell relating to the moving of the hand and the turning of the head as well as to the submission of that question to the jury. From these rulings and exceptions and what transpired when they were made and taken it is obvious that the court plainly and intentionally instructed the jury that this evidence was proper and should be considered by them in determining the defendant's guilt or innocence. Under these circumstances, in view of the prominence and importance which was given to that evidence, it is impossible to say that its admission did not affect the substantial rights of the defendant.

The only other evidence submitted to the jury upon the question whether the decedent truthfully stated that the

offense was not committed by the defendant was that of the witness Emily Bugbee, which consisted of the defendant's statement as to what the witness had said and what had subsequently appeared in a newspaper. In that conversation, so far as it related to that subject, there was no admission or confession by the defendant of any fact material to the issue. The only admissions that could be possibly spelled out of that evidence were that Mrs. Bugbee had told him that the decedent could not talk and that an article was published in a newspaper to the effect that the witness had said that Mrs. Smith had declared that the defendant did it. The remainder was the mere statement of an incident which not only had no bearing upon the issue, but was mere hearsay. The declarations of a party that he had heard or read certain statements cannot be given in evidence against him to establish such statements, because they are at most hearsay, and when stated by him as such it does not change their nature, but they continue to be hearsay and are, consequently, inadmissible. All the defendant said as to the newspaper account was that it contained a statement to the effect that the witness had said that the decedent declared that the defendant did it. This was not an admission that he did it, or of the truth of any of the matters thus stated. (*Stephens v. Vroman*, 16 N. Y. 381; *Reed v. McCord*, 160 N. Y. 330, 341.)

While it was competent to prove that the defendant, when in the presence of his wife, did not look at her or that he shed no tears, still that was not the object, nature or limit of the proof objected to, as is manifest from the character of the examination, the nature of the exceptions and rulings, and from the evidence thus received. The proof objected to related entirely to the appearance, acts, looks, movements, temperature, demeanor and physical condition of the decedent when the defendant was absent, what she did and omitted to do in his presence, and his silence. By this proof and by evidence that she said something to the witness Dabell that, together with her looks, led her to know the impulse of the decedent, the defendant was sought to be bound by his silence,

N. Y. Rep.] Opinion of the Court, per MARTIN, J.

not only as to what the decedent did or did not do, but also by some impulse she might be supposed to have possessed, by hearsay evidence and by the conclusion of a witness based upon her unproved declarations. It is manifest that many of the rulings admitting this evidence were erroneous, and, in view of the charge of the learned judge, it cannot be said that they did not affect the defendant's substantial rights.

Fifth. Another class of exceptions argued by the appellant relates to the admission of the evidence of the witness Albert L. Hall, who testified as an alleged expert as to the manufacture, uses and differences of pistols and cartridges, the chemistry of burned powder and other substances, and to receiving the speculative opinion of the witness, which was incompetent and subsequently stricken out by the court of its own motion, without consent or objection. The court was occupied several days in taking the evidence of this witness, to which there were numerous objections and exceptions that were obviously valid. It is impossible, within the limits of this opinion, to consider in detail all the items of his evidence that were received by the court under the defendant's objections and exceptions, or to state accurately each portion of his testimony which is claimed to have been stricken out. That this witness was improperly permitted to testify as an expert to many matters material to the investigation, when he was obviously incompetent, can hardly be denied. This was recognized by the trial court, and it subsequently attempted to cure the errors in its admission by striking out the portions of the evidence that were improperly received. It is obvious from the record that the court struck out portions of the improper evidence which were specifically stated, and followed this action by a general statement to the effect that all the testimony of that witness, except that pertaining to his experiments with powder after revolvers had been discharged and with reference to the appearance and condition of the fatal bullet, was stricken out and the jury directed to disregard it. Subsequently other portions of his testimony were directed to be stricken out. The court likewise stated that it would direct

all exhibits introduced on the examination of the witness to be stricken out if there was any question about them, but that they were actually stricken out does not appear. It may be fairly said that it is difficult, if not impossible, to ascertain even from the record with any degree of accuracy the particular portions of the evidence of this witness which the court attempted to withhold from the consideration of the jury. This difficulty arises from the fact that it is hardly possible to determine what evidence pertained to his experiments with powder after revolvers had been discharged ; what pertained to his testimony with reference to the appearance and condition of the fatal bullet, to separate it from the other evidence which was given by him, or to ascertain what particular portion of the remaining evidence was subsequently withdrawn. The evidence which was competent and that which was incompetent was so intermingled and woven together as to render it difficult to separate one from the other, and it must have been almost, if not quite, impossible for the jury under the rulings of the court to understand what portion of this evidence was to be disregarded and what portion it was to consider. It is true that the court stated to the counsel for the defendant that if he desired all the evidence of this witness might be stricken out, and when the foundation was properly laid the witness might be recalled. To this, however, counsel did not assent, but stated that he had all the harm of the evidence and did not know any way to correct it except partially by cross-examination, but that if the witness was not coming back and the evidence was to go out for good on the basis that it was too speculative and uncertain to be the foundation of any conclusion, it would help. Thus it is seen that only a portion of the evidence of the witness was withdrawn from the consideration of the jury ; that it was difficult, if not impossible, for the jury to determine what was stricken out and what remained, and, hence, the question presented is whether under those circumstances the error in admitting this evidence was so far cured that it should be disregarded upon this appeal. It seems to be settled by the decisions of this court that if

evidence is improperly admitted, the mistake is immediately discovered and the evidence promptly withdrawn with instructions to the jury to disregard it, or if it is stricken out on the motion or application of the appellant, the error will be deemed cured or waived and the exception to its admission deprived of its potency. (*Gall v. Gall*, 114 N. Y. 109; *Holmes v. Moffat*, 120 N. Y. 159; *People v. Schooley*, 149 N. Y. 99, 103; *Cole v. Fall Brook Coal Co.*, 159 N. Y. 59, 65; *People v. Priori*, 164 N. Y. 459, 469.)

In the case at bar, although the court, when the first portion of this evidence was stricken out, stated that the jury should disregard it, we have not found that such a direction accompanied each instance where such an order was made, or that the jury were directed in the charge of the court to disregard any part of it.

The theory of the decisions to the effect that errors in receiving improper evidence may be cured when the jury are clearly and plainly instructed to disregard certain specified evidence so erroneously and recently received and the evidence is promptly stricken out, is based upon the presumption that the instructions of the court were obeyed. The circumstances under which that rule has generally been applied were widely and essentially different from those in the case at bar. Here, many days had been employed in taking the testimony of this witness and many pages of evidence had been given by him, which was so interwoven as to render it extremely difficult under the rulings of the court for a jury to understand or determine what portion of the evidence remained in the case which they were to consider and what portion they were instructed to disregard. Under such circumstances it would indeed be very extraordinary to presume that the jury in this case literally obeyed the instructions of the court, no matter how much they may have intended to do so. In the recent case of *Ives v. Ellis* (169 N. Y. 85, 90) incompetent evidence was received, the court at the time remarking, "I shall instruct the jury that the letter and the statements in the letter do not in any wise prove the statements therein contained, or any of

them." Upon appeal to this court it was held that the admission of the evidence was error, that the error was not cured by the statements made by the court when it was admitted, and it was said: "For an appellate court to sustain a ruling admitting incompetent, but, to lay minds, persuasive evidence, because before its reading the court states that the evidence does not in any wise prove the statements therein contained, would not only be unprecedented, but would be mischievous in its tendency." It was there claimed that the error was subsequently cured by the trial court, which, in the course of its charge, cautioned the jury to entirely disregard the evidence which was thus erroneously admitted. In discussing that question this court added: "But before an appellate court will hold that such an error has been cured, it must feel sure that the effort of the trial court to correct the error was necessarily effective with the minds of the jury. Now that cannot be said of the caution of the court in this instance, for it must be borne in mind that this letter was introduced in the early part of the trial, which was not only a long one, but in its progress there was an adjournment for a period of ten days, during which the jurors presumably had their minds occupied with affairs of their own; and in view of that situation it was necessary that the court should so accurately describe the letter which it wished them to disregard as to make it apparent that there could be no confusion in their minds as to what letter was referred to." We think the principle of that decision is applicable to and decisive of this case. Here the objectionable evidence occupied a number of days in its admission and related to a variety of subjects. It was not all stricken out. Nor was the portion stricken out, stricken out at one time, but upon several occasions with no clear statement of the particular part of the evidence thus eliminated, and this occurred many days before the conclusion of the trial. It was upon the court's own motion and not upon the application of the defendant. Hence, in view of all these circumstances, it seems quite impossible to say that the error was waived or that the court so accurately described the evidence to be dis-

N. Y. Rep.] Opinion of the Court, per MARTIN, J.

regarded, or that its directions were at a time when they would be so firmly impressed upon the minds of the jury as to justify us in holding that there was a presumption that the jury obeyed the suggestions of the court, and the error in its admission was cured.

But it is said that the court offered to strike out the entire evidence of the witness and permit him to be recalled when the proper foundation was laid. While this is true, we think it did not affect the error in the previous rulings of the court, especially as the evidence was not stricken out. We think these exceptions fall within the principle of the decision in *Furst v. Second Ave. R. R. Co.* (72 N. Y. 542). In that case the court received incompetent evidence. The plaintiff's counsel proposed to have it stricken out. The defendant's counsel declined to accept the proposition and elected to retain his exception. The court made no ruling and gave no instructions upon the subject. It was there held that the counsel had the right to insist upon his exception, was not bound to waive it, and that the error was not cured by an offer to strike out. We are of the opinion that the court committed several errors in the admission of the evidence of the witness Hall, and that they were not cured by any direction of the court contained in the record.

Sixth. The only other exception we deem it necessary to specially consider relates to the admission of proof of the dying declarations of the decedent. In a case of homicide, the declarations of the deceased person as to the cause of his death or as to the circumstances of the particular transaction which resulted in his death, are admissible, but only when it is shown to the satisfaction of the judge that the decedent was in actual danger of death and had given up all hope of recovery at the time when the declarations were made. But such declarations are not competent evidence of prior or subsequent occurrences, nor of matters of opinion. The only questions we need consider in relation to the admissibility of this evidence are: 1. Whether the preliminary proof that the declarations of the decedent were made under a sense of

impending death, was sufficient to justify the court in admitting them in evidence; and, 2. Whether the transactions which occurred several hours before the homicide could be properly proved by that species of evidence. As we have already seen, in order to render her declarations admissible, it was necessary to show that they were made by the decedent at a time when she was in actual danger of death, and that she had no hope of recovery. An examination of the evidence taken upon this preliminary question renders it evident that it was sufficient to justify the court in its conclusion that they were made by the decedent under a sense of impending death. This was established by her declarations, the testimony of the attending physicians, and the circumstances showing her condition, and that it was realized by her.

The more serious question, however, is whether the declarations of the decedent were properly admitted as to what transpired before the time of the homicide. The record plainly discloses that the proof of the dying declarations of the decedent in which it was stated that she said, "I guess I got up first; I heard him strike a match; it was about twelve o'clock, and I got into bed first," all related not to the transaction which took place at the time of the tragedy or to the homicide, but to a disconnected transaction which occurred about three hours before the fatal injuries were received by her. As to her statements in this respect, there is some variance in the proof. But without considering any discrepancies in the evidence, it is obvious that the greater portion of the dying declarations of which proof was admitted referred, not to the homicide, but to an occurrence which took place hours before. Manifestly, that occurrence formed no part of the *res gestæ*, but was an independent transaction, not shown to have had any connection with the crime, and the declarations of the decedent in relation thereto were a mere narrative of past occurrences and not a part of the act which resulted in her death. (*Waldele v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 274; *People v. Driscoll*, 107 N. Y. 414, 424; *Martin v. N. Y., N. H. & H. R. R. Co.*, 103 N. Y. 626.) It seems

N. Y. Rep.] Opinion of the Court, per MARTIN, J.

to be well settled that dying declarations are admissible in cases of homicide only when the death of the decedent is the subject of the charge, and the circumstances of the death are the subject of the declarations, and that they may not properly include narratives of past occurrences. (*People v. Davis*, 56 N. Y. 95; *Eighmy v. People*, 79 N. Y. 546, 559; *People v. Shaw*, 63 N. Y. 36; *Greenfield v. People*, 85 N. Y. 75, 88; 1 Greenleaf on Evidence, § 156; 1 Taylor on Evidence, 655; Chase's Stephen's Law of Evidence, 86, art. 26.)

It is, therefore, manifest that under the rules of law governing the admission of dying declarations, the trial court erred in admitting proof of the declarations of the decedent as to what occurred previous to the homicide.

It is a well-established principle of criminal law that the rejection of competent and material evidence, or the reception of incompetent and improper evidence, which is harmful to a defendant and excepted to, presents error requiring a reversal. Such a ruling affects a substantial right of the defendant, even though the appellate court would, with the rejected evidence before it, or with the improper evidence excluded, still come to the same conclusion reached by the jury. The defendant has the right to insist that material and legal evidence offered by him should be received and submitted to the jury, and to have illegal and improper evidence, which may be harmful, excluded, and to have the opinion of the jury upon proper evidence admitted in the case, and upon such evidence alone. (*People v. Greenwall*, 108 N. Y. 296; *People v. Wood*, 126 N. Y. 249; *People v. Corey*, 148 N. Y. 476, 494; *People v. Koerner*, 154 N. Y. 355, 376.) The burden of showing that the illegal and improper evidence which was received was harmful is not upon the appellant, but that it was harmless and could by no possibility have prejudiced him must be established by the respondent. (*Greene v. White*, 37 N. Y. 405, 407; *Stokes v. People*, 53 N. Y. 164; *People v. Corey*, 148 N. Y. 476, 494; *People v. Strait*, 154 N. Y. 165, 171; *People v. Helmer*, 154 N. Y. 596, 602.)

We are of the opinion that much of the evidence received by the court under the defendant's objections and the exceptions which we have already discussed, was incompetent and improper, and as such rulings cannot be properly held to have been harmless, it follows that the judgment must be reversed.

Numerous other questions are presented by the exceptions of the defendant, were discussed upon the argument and in the briefs of the respective counsel, but the fact that the judgment must be reversed for the errors already pointed out, and inasmuch as this opinion has already exceeded the bounds to which it should be limited, it becomes necessary to omit any further or special discussion of the other questions thus presented.

The judgment should be reversed and a new trial ordered.

PARKER, Ch. J., O'BRIEN, BARTLETT, VANN, CULLEN and WERNER, JJ., concur.

Judgment of conviction reversed and new trial ordered.

MOUNT MORRIS BANK, Respondent, v. TWENTY-THIRD WARD BANK, Appellant.

1. BANKING — CONSTRUCTION OF RULES OF NEW YORK CLEARING HOUSE CONCERNING REPAYMENT OF COMMERCIAL PAPER RETURNED AS "NOT GOOD." The provision of the constitution of the New York Clearing House, that "All checks, drafts, notes or items in the exchanges returned as 'not good,' or missent, shall be returned the same day directly to the bank from which they were received, and the said bank shall immediately refund, to the bank returning the same, the amount which it had received through the clearing house for the said checks, drafts, notes or items, so returned to it, in specie or legal tender notes," is not repealed or abrogated by a later provision, that, in case of the failure or inability of any bank to promptly refund to the bank holding paper returned as "not good," such bank may report to the manager of the clearing house the amount of the same, who shall thereafter, with the approval of the clearing house committee, readjust the clearing house statement and declare the correct balance between such banks, provided that such report be given to the manager before one o'clock of the same day; and the bank charged by the clearing house with the amount of the paper returned as "not good" is at liberty to let such charge stand against it in the account

of the clearing house and seek reclamation directly from the bank required to refund such amount under express contract of the latter imposed upon it by the rules of the clearing house.

2. PROMISSORY NOTE—ERRONEOUS CERTIFICATION, OF WHICH HOLDER IS IMMEDIATELY NOTIFIED—WHEN PAID THROUGH CLEARING HOUSE, AMOUNT THEREOF MAY BE RECOVERED FROM BANK RECEIVING IT. Where one bank, at the request of another, certified, through mistake, a note payable at it as good, but within a short time, and on the same day, discovered the error and notified the bank holding the note of such error and requested it to erase the certification, and the latter bank, notwithstanding such notice, sent the note, through its clearing bank and agent, to the clearing house by which it was charged to the account of the clearing bank and agent of the bank at which said note was payable, and on the same day the latter bank tendered a return of the note both to the bank which had sent the note to the clearing house and its clearing bank, and demanded repayment of the amount thereof, which was refused, such bank may maintain an action to recover such amount against the bank receiving the same from the clearing house, since it was not the duty of the plaintiff bank to have applied to the manager of the clearing house for a resettlement of the accounts, and its failure to do so did not operate to make the payment of the note voluntary.

Mount Morris Bank v. Twenty-third Ward Bank, 60 App. Div. 205, affirmed.

(Argued June 24, 1902; decided October 7, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 11, 1901, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

George M. Mackellar and *Clarence Loxow* for appellant. The constitution of the clearing house, to which neither the plaintiff nor the defendant was a party, is not binding upon the defendant. (Morse on Banks & Banking [3d ed.], §§ 350, 351; *People v. St. N. Bank*, 77 Hun, 159; *M. Bank v. Thompson*, 129 Mass. 438; *Overman v. H. Bank*, 31 N. J. L. 563; *S. Bank v. N. M. B. Assn.*, 7 Lans. 197.) No recovery can be had, because the payment of the note was voluntary and made by plaintiff with full knowledge of all the facts. (*Irving Bank v. Wetherald*, 36 N. Y. 335; 3 Am.

& Eng. Ency. of Law [1st ed.], 221; 2 Daniel on Neg. Inst. § 1608; *M. Nat. Bank v. N. E. Bank*, 101 Mass. 281; *G. Nat. Bank v. F. D. Bank*, 118 Penn. St. 294; *Crane v. F. S. Nat. Bank*, 173 Penn. St. 567; *E. Bank v. Bank of N. A.*, 132 Mass. 147; *Wyman v. Farnworth*, 3 Barb. 369; *Nat. L. Ins. Co. v. Jones*, 1 T. & C. 466; 59 N. Y. 649; *Flower v. Lance*, 59 N. Y. 603; *Wood v. Mayor*, 25 App. Div. 577; *Vanderbeek v. City of Rochester*, 122 N. Y. 285.)

John A. Garver for respondent. Money paid under a mistake of fact can be recovered. (*Bize v. Dickason*, 1 T. R. 285; *Rheel v. Hicks*, 25 N. Y. 289; *Nat. Bank v. Banking Assn.*, 55 N. Y. 211; *Mayor v. Mayor, etc.*, 63 N. Y. 455.) The same principle is applied to the certification, by mistake, of checks or notes. (Daniel on Neg. Inst. § 1608; Morse on Banking, § 419; *Cooke v. S. Nat. Bank*, 52 N. Y. 96; *I. Bank v. Wetherald*, 36 N. Y. 335; *N. P. Bank v. S., etc., Mfg. Co.*, 58 Hun, 81; *S. Nat. Bank v. W. Nat. Bank*, 51 Md. 128.) The payment of the note was not voluntary. (*O'Brien v. Grant*, 146 N. Y. 163.)

CULLEN, J. The action is brought to recover money paid on a promissory note payable at the plaintiff's bank. When the note became due, at the request of the defendant, it was certified by the plaintiff. This was done through a mistake as to the condition of the maker's account with the bank. Within a very short time, on the same day, the plaintiff discovered the error and notified the defendant thereof, requesting it to erase the certification. Of this it is sufficient to say that the appellant concedes that the right of no party was affected by the certification, and that under the decision of this court in *Irving Bank v. Wetherald* (36 N. Y. 335) the plaintiff was not estopped from showing that it certified the check through mistake. The appellant makes no attack on the judgment based on such certification. Neither the plaintiff nor the defendant were directly members of the clearing house in the city of New York, but each cleared through another bank which was a member. The complaint alleges

that both the parties to the action were, under their respective agreements for clearing, bound by the rules of the clearing house, and this allegation is expressly admitted by the answer. Notwithstanding the notice it had received from the plaintiff, the defendant deposited the note in its clearing bank, and thereafter the same was paid through the clearing house. On the same day the plaintiff tendered a return of the note both to the defendant and its clearing bank and demanded repayment of its amount. This was refused, and thereupon the present action was brought.

While the appellant concedes that it acquired no right against the plaintiff by the certification of the note, it insists that the case is to be considered the same as if the note had not been certified nor notice given by the plaintiff that the maker's account was not good. It then contends that the payment was voluntary, not made under a mistake of fact, and that hence the plaintiff is precluded from recovering. Conceding the position of the defendant that the cause of action is not affected by its certification of the note, the plaintiff's right to recover depends on the rules of the clearing house which are found in the record. That association appears by its constitution to have adopted a very simple manner of settling the drafts, checks and other claims of its various members against the others. Each member, every morning, delivers to the clearing house the checks, drafts and notes it holds against the other banks and receives credit therefor, while it is charged with all checks, drafts or notes payable by it and deposited by other banks. If its deposits exceed the drafts and checks deposited against it, it receives from the clearing house during the day the amount of the excess in money, while if the reverse proves the case, it is obliged to pay the balance against it to the clearing house. In this daily settlement of the clearing house no account is taken of the fact that the checks may be bad. All checks, drafts or notes on any bank are charged against it, though the accounts of the drawers of those checks or the makers of the notes may not be good for their amounts, and even though

the checks be forgeries. By section 14 of the constitution it is provided that the association shall be no way responsible for such items, but that they are to be adjusted directly between the bank that deposited them in the clearing house and the bank on which they were drawn. Section 15 provides that "All checks, drafts, notes or other items in the exchanges returned as 'not good' or missent, shall be returned the same day directly to the bank from whom they were received, and the said bank shall immediately refund to the bank returning the same the amount which it had received through the clearing house for the said checks, drafts, notes or other items so returned to it in specie or legal tender notes." It will be seen that the system of clearances adopted by the association is very simple, and that it enables exchanges of the greatest magnitude to be effected in a remarkably brief period of time. This could be accomplished only by making the several banks return the bad checks or notes directly to the banks which deposited them and keeping the accounts of the clearing house free from all such items. The system had a weak feature; that is, the contingency that a bank depositing a bad check on another bank, possibly for a very large sum, might refuse or might fail and be unable to pay the amount of such check for which it had received credit in the clearing house. In such a case the bank on which the check was drawn would have been compelled to pay the amount of the check in money to the clearing house and thus have lost it either in whole or part. This danger, however, could not have been regarded as imminent, for the rules remained in the condition I have stated until 1884. In that year, whether because a case of the kind suggested actually arose or not does not appear in the record, a further rule was adopted as an addition to section 15: "In case of the refusal or inability of any bank to promptly refund to the bank presenting such checks, drafts or other items, returned as not good, the bank holding them may report to the manager the amount of the same. And it shall be the manager's duty, with the approval of the Clearing House Committee, to take from the settling sheet of both banks the amount of such checks, drafts or other

N. Y. Rep.] Opinion of the Court, per CULLEN, J.

item so reported, and to readjust the Clearing House statement and declare the correct balance in conformity with the change so made, provided that such report shall be given to the manager before one o'clock of the same day." The appellant contends that it was the duty of the plaintiff on finding the note in its exchanges of the day to have applied to the manager of the clearing house for a resettlement of the accounts, and that its failure to do so operated to make the payment of the note voluntary. We think not. The provision of the constitution last quoted did not repeal the previous provision of section 15, whereby the depositing bank is bound to repay in money any check or note returned the same day as not good. Nor was it intended to act as a substitute for that provision. It appears by the testimony of the manager of the clearing house that the number of checks and drafts cleared daily is from eighty to a hundred thousand. It is extremely improbable and bordering on the impossible that out of that vast number several should not prove bad. If these bad checks were to be always settled by a restatement of the clearing house accounts the simplicity and expedition of the clearing house system of exchanges would be very much impaired if not destroyed. It would seem from its very language, which requires the approval of the committee, that the amendment of 1884 was intended to apply only in exceptional cases where otherwise a bank would be unable to obtain relief, and that it did not in any respect abrogate the obligation of the depositing bank to repay a member any items of the exchanges which might be returned as not good. The plaintiff, therefore, was at entire liberty to let the charge for the note stand against it in the account of the clearing house and seek reclamation directly from the defendant under the express contract of the latter imposed upon it by the rules of the clearing house.

The judgment appealed from should be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN, VANN and WERNER, JJ., concur.

Judgment affirmed.

SECOND NATIONAL BANK OF MORGANTOWN, Appellant, v.
CHARLES WESTON, as Executor of ABIJAH WESTON,
Deceased, Respondent, Impleaded with Others.

1. APPEAL—QUESTION OF LAW—DIRECTION OF VERDICT. The unanimous affirmance by the Appellate Division of a judgment, entered upon a verdict directed on uncontroverted evidence, does not preclude the Court of Appeals from considering whether the evidence justified the direction of the verdict.

2. TRIAL—DIRECTION OF VERDICT—GOOD FAITH. A bank which has discounted from time to time a series of notes upon the representations of the payee and of the firm which made them, that they were given for value, and which were promptly paid, is not chargeable with negligence or bad faith, and a verdict is properly directed in its favor on that issue, where it subsequently discounted accommodation notes executed to the same payee by a member of the same firm, in the name of the firm, but after its dissolution, of which fact no sufficient notice was given, where the payee represented that the notes were based upon a valid consideration.

3. EVIDENCE—BAD FAITH. The purchase by a bank of notes at a discount of eight per cent per annum, when the legal rate of interest is six per cent, is not such an excessive rate of discount as to warrant the inference of bad faith.

4. TRIAL—INTERESTED WITNESS—CREDIBILITY. The evidence of a party to an action is conclusive, and his credibility is not presented as a question of fact where his testimony is not contradicted by direct evidence nor by any legitimate inference from the evidence, and is neither opposed to the probabilities, nor in its nature surprising or suspicious.

Second Nat. Bank v. Weston, 46 App. Div. 634, reversed.

(Argued June 18, 1902; decided October 7, 1902.)

APPEAL from a judgment entered January 4, 1900, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department, overruling plaintiff's exceptions, ordered to be heard in the first instance by the Appellate Division, denying a motion for a new trial and directing judgment for defendant on the verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

C. S. Cary for appellant. The direction of a verdict for the defendant, and the affirmation of that direction by the appellate court was error in law. Plaintiff was clearly entitled under the undisputed evidence and the law to the direction of a verdict in its favor. (*B. B. Bank v. Hoge*, 35 N. Y. 66; *Dalrymple v. Hillinbrand*, 62 N. Y. 11; *Hoge v. Lansing*, 35 N. Y. 136; *Cowing v. Altman*, 71 N. Y. 439; *Cheever v. P. R. R. Co.*, 150 N. Y. 59; *A. E. Nat. Bank v. N. Y. B. Co.*, 148 N. Y. 698; *Murray v. Lardner*, 2 Wall. 110.) The fact that eight per cent interest was taken, outside the question of usury which is not pleaded, cannot affect the question of good faith. (1. *Daniels on Neg. Inst.* §§ 777-779; *Cheever v. P. R. R. Co.*, 150 N. Y. 65.)

J. H. Waring for respondent. The notes in suit were invalid as between the parties to them. (*Smith v. Weston*, 159 N. Y. 194; *Bank, etc., v. Weston*, 159 N. Y. 201.) It has been found that the plaintiff was not a *bona fide* holder of the notes in suit, and that finding is conclusive on this court. (*Smith v. Weston*, 159 N. Y. 194; *Thompson v. Simpson*, 128 N. Y. 270; *Koehler v. Adler*, 78 N. Y. 287; *Stratford v. Jones*, 97 N. Y. 586.) The burden of proof was on the plaintiff to show it was a *bona fide* holder. (*Smith v. Weston*, 159 N. Y. 194; *Joy v. Diefendorf*, 130 N. Y. 6; *C. N. Bank v. Diefendorf*, 123 N. Y. 191; *Nickerson v. Ruger*, 76 N. Y. 279; *F. N. Bank v. Green*, 43 N. Y. 298.) The proof offered by the plaintiff on the question of its being a *bona fide* holder was not conclusive. (*C. N. Bank v. Diefendorf*, 123 N. Y. 191; *Elwood v. W. U. Tel. Co.*, 45 N. Y. 549; *Honegger v. Wettstein*, 94 N. Y. 252.) The interest of the plaintiff's cashier in the event, the rate of interest charged, and the other circumstances in the case, some of which are referred to above, were all evidence raising a question of fact, and the court's finding is conclusive here. (*Morrell v. Peck*, 88 N. Y. 398; *Kenney v. City of Cohoes*, 100 N. Y. 623; *Meacham v. N. Y. S. M. B. A.*, 120 N. Y. 237.)

CULLEN, J. The action was brought against Wallace W. Weston, Orren Weston and Abijah Weston, as makers, and George E. Ramsey, as indorser, of three promissory notes, all bearing date December 21st, 1891, and payable respectively at twenty, twenty-one and twenty-four months after date, at the First National Bank of Olean, New York. The plaintiff is a national bank located at Morgantown, West Virginia about four hundred miles from Olean. The defendants Weston were, up to the 5th day of January, 1892, copartners carrying on a very large lumber business at Weston Mills near Olean, under the firm name of Weston Brothers. On that day the firm was dissolved but no notice of the dissolution was given in any other manner than by communication to two commercial agencies, and the plaintiff had no knowledge of the fact until November, 1893. In September, 1891, application was made by the payee, Ramsey, through the law firm of Cox & Baker, of Morgantown, to the plaintiff for the discount of certain notes of Weston Brothers held by him. On such application being made the plaintiff wrote to the First National Bank of Olean and received a letter from its cashier, stating the wealth of the makers, that the notes would be promptly paid and that the Olean bank would itself have discounted the notes but it did not have the available funds. The plaintiff wrote to the makers, Weston Brothers, and received an answer from that firm saying that the notes held by Ramsey were given for the purchase of real estate and were all right. It also wrote to several parties in Olean, with whom it had acquaintance, and was informed of the excellent business standing of the makers and that they were regarded as millionaires. On these reports the notes were discounted at the rate of eight per cent per annum, and the proceeds placed to the credit of Ramsey and paid out on his order. The notes were paid at maturity.

In May, 1892, other notes of the same character and apparently of the same date were discounted for Ramsey. On this occasion the plaintiff received another letter from Weston Brothers saying that "the paper that Ramsey had,

made by that firm, was some of the same realty transaction which it (the plaintiff) had already discounted" and as to which the firm had written to it, and that they would be paid as usual. These notes were also paid in due course. Finally, in June, 1893, the plaintiff discounted the three notes in suit.

On the trial it was proved by the defendant that the notes were not given for any consideration, but were made by Wallace W. Weston, one of the members of the firm, simply for the accommodation of the payee, Ramsey, and that though they bore date December 21st, 1891, they were not actually made until a year after the firm had been dissolved. It further appeared that Abijah Weston, the respondent's testator, had, for some time prior to the dissolution of the firm, been aware that Wallace W. Weston was giving firm notes for his personal transactions and for the accommodation of others, and had remonstrated with him on his action. For this reason the firm was dissolved and the business turned over to a corporation, but, as stated, no proper notice was given of such dissolution, nor of the fact that Wallace W. Weston had improperly used the firm paper.

We have decided in *Bank of Monongahela Valley v. Weston* (159 N. Y. 201) that the notice of dissolution given by communication to the commercial agencies was insufficient. The proof for the respondent established that the notes were fraudulently issued by the defendant Wallace W. Weston as against his former copartners. It thereupon was incumbent upon the plaintiff to show that it was a *bona fide* holder of the notes for value, and the only question to be considered on this appeal is whether it so conclusively established that fact as to be entitled to the direction of a verdict in its favor.

Before a discussion of that question is had there is to be considered a claim made by respondent, that we are concluded by the unanimous decision of the Appellate Division. It is said that where each party requests the direction of a verdict, and neither asks to go to the jury, the case presented on appeal is the same in effect as if the case had been duly submitted to the jury and they had found a verdict for the

party in whose favor the court directs a verdict. It is then contended that such being the effect of a directed verdict, a unanimous affirmance is conclusive upon us that there was evidence to justify the direction of a verdict to the same extent as if the affirmance was of a judgment entered upon the verdict of a jury. The first proposition is true, however, only to a limited extent. A directed verdict, when no request is made to go to the jury, is the same in effect as the verdict of a jury only when the disposition of the cause depends upon the determination of some question of fact. In that case it may be that a unanimous affirmance is conclusive. But in such a case it is never necessary for the respondent to invoke the rule of a unanimous affirmance, for this court is precluded from examining any question of fact, whether the affirmance is unanimous or not. But the right of a party to have a verdict directed in his favor on uncontroverted evidence presents merely a question of law, and that question of law is expressly reserved for our consideration, both by the Constitution and by the provisions of the Code, except in the single case where the cause is submitted to the jury and the verdict rendered by it unanimously upheld by the Appellate Division.

While, after proof had been given on behalf of the defendants that the notes were fraudulently and illegally issued, it became incumbent upon the plaintiff, in order to succeed, to establish that it had acquired the notes in good faith for value, still the question was solely one of good faith. "The rights of a holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence." (*Magee v. Badger*, 34 N. Y. 247; *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 202; *Am. Ex. Nat. Bank v. N. Y. Belting & P. Co.*, 148 N. Y. 698.) Negligence of the holder is simply material so far as it goes to show lack of good faith. "The holder's rights cannot be defeated without proof of actual notice of the defect in title or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted

precautions which a prudent man would have taken, nevertheless, unless he acted *mala fide*, his title, according to settled doctrine, will prevail." (*Cheever v. Pittsburgh, S. & L. E. R. R. Co.*, 150 N. Y. 59, 66.)

Assnning the truth of the evidence given on behalf of the plaintiff, there is no circumstance disclosed by the record from which there can be imputed to it negligence, much less bad faith; on the contrary, it seems to have acted with great caution and care. We shall not elaborate the discussion, but simply say we do not see what more the plaintiff could have done if it was to discount the notes at all. The respondent insists that the discount of the notes at eight per cent per annum (the legal rate in West Virginia, as in this state, being six per cent) was evidence of bad faith. There is one authority in this state that justifies the claim, the case of *Hall v. Wilson* (16 Barb. 548). Before considering that case it is necessary to note two earlier decisions. In *Ramsdell v. Morgan* (16 Wend. 574) Judge COWEN declared it to be a solecism to say "a *bona fide* purchaser on usury." In *Keutgen v. Parks* (2 Sandf. 60) Judge SANDFORD said (p. 64): "Can that be said to have been done in *good faith*, or in the usual course of trade, which is done contrary to the positive prohibition of a statute, and which the statute declares to be void? We are satisfied that it cannot." In each of those cases the contract, under which were delivered in the first case chattels and in the second a note, was usurious on its face and known to be so to the plaintiff. In *Hall v. Wilson* (*supra*) the Supreme Court went one step farther. There the action was on a promissory note payable to a named payee, or bearer, and given for the purpose of taking up another note for the same amount. A third party abstracted the note and sold it at a discount to the plaintiff. Usury was not pleaded, but it was held that as the note was in fact usurious because it had no lawful inception until its transfer to the plaintiff, the usury destroyed the *bona fides* of the transaction. I doubt if any of these cases remain authorities on the proposition for which they have been cited.

In *Williams v. Tilt* (33 N. Y. 319) it was held by this court that the *bona fides* of a holder or purchaser depends upon his knowledge of or privity with the fraud by which the property has been obtained from the original owner, and not on the existence of usury in the contract between him and the person from whom he acquires it. The case of *Hall v. Wilson* (*supra*) is not referred to in the opinion, but the cases of *Ramsdell v. Morgan* (*supra*) and *Keutgen v. Parks* (*supra*) are practically overruled. On the authority of *Williams v. Tilt* it was held by the Supreme Court in the fourth department that usury did not necessarily destroy the *bona fides* of a holder of a promissory note. (*Miller v. Crayton*, 3 Thompson & Cook, 360.) The argument of the learned judge who wrote in *Hall v. Wilson* (*supra*), that because the note in that case was usurious and void, had usury been pleaded, the plaintiff could not have acquired it in good faith, seems to me essentially unsound. It proves too much. Had the plaintiff Hall transferred the note before maturity to another person for the legal discount or less, the note under our statute would have been equally void in the hands of such purchaser as in the hands of Hall. It would be idle, however, to suggest that such a purchaser had not taken the note in absolute good faith. It is clear, therefore, that the question of usury does not necessarily determine the question of good faith. Whatever force there may be in the argument of the *Ramsdell* and *Keutgen* cases, that a person cannot be deemed to acquire a note in good faith when he receives it through a transaction which is made criminal, that argument can have no application to the case of one who has taken a note on a purchase which, if the circumstances represented to him were true, was entirely legal.

The notes in suit were discounted by the plaintiff on the representation of Ramsey that they had been given to him for value, in which representation as to the first notes of the series discounted the makers joined. By reason of those representations as to the earlier notes the plaintiff could have recovered against both parties, and as to the notes in suit as

against the payee, even though it were not a national bank but a natural person. (*Payne v. Burnham*, 62 N. Y. 69.) It is the right of a person to refuse to loan money at the legal interest and to require a valid security to be given, which he can purchase at any rate of discount agreed upon. (*Union Dime Savings Inst'n v. Wilmot*, 94 N. Y. 221.) The fact, therefore, that a negotiable security is purchased at a discount exceeding the legal rate has no effect on the question of the *bona fides* of the purchaser except in one respect which does not exist in the present case.

The discount taken may be so great as to impeach the good faith of the purchaser, the same as a chattel may be bought at so much under its true value as to justify the inference that the purchaser knew or suspected that it had been dishonestly acquired by his vendor. *Hall v. Wilson* has been cited in several later cases, but an examination of those cases will show that there the rate of discount was so excessive as to warrant the inference of bad faith. In *Canajoharie Nat. Bank v. Diefendorf* (*supra*) the notes of a perfectly responsible maker were purchased at a discount of from fifteen to eighteen per cent from their face value. In *Fosburgh v. Diefendorf* (119 N. Y. 357) the notes of the same maker were purchased for fifty per cent of their face value. In the present case the rate of discount, eight per cent per annum, is not sufficiently great to predicate upon it any inference of bad faith. On the contrary, it would be unreasonable to suppose that the plaintiff knowingly took a doubtful security for an excess of interest amounting to about one per cent on the face value of the notes. I think the true rule is stated in *Gould v. Segee* (5 Duer, 260): "Hence, when usury is not set up as a separate defense, unless it is so gross as to raise the presumption of fraud, the proof of its existence may be justly disregarded. Where an accommodation note is purchased at a rate of discount exceeding that of lawful interest, the transaction, in judgment of law, is usurious, but the mere fact that it is so is no evidence of the bad faith of the purchaser; is no evidence that he knew, or suspected,

that the holder of the note, from whom he derived his title, had no right or authority to transfer it."

The further contention is made by the respondent that as the circumstances attending the discount of the note were proved by the testimony of the cashier, who was also a stockholder in the plaintiff, he was an interested witness and his credibility presented a question of fact for the jury, or in this case as there was no request to go to the jury, for the court to pass upon. The rule invoked by the respondent is not of universal application. "Generally, the credibility of a witness, who is a party to the action and, therefore, interested in its result, is for the jury; but this rule, being founded in reason, is not an absolute and inflexible one. * * * Where, however, the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities; nor, in its nature, surprising or suspicious, there is no reason for denying to it conclusiveness." (*Hull v. Littner*, 162 N. Y. 569, 572.) In that case the direction of a verdict on the testimony of a party to the action was upheld. In the present action it is not true that the plaintiff's case is based entirely on the testimony of its cashier. The genuineness of the letters of Weston Brothers, the makers, to the plaintiff is admitted. They are in the record; also the letters of Ramsey, the payee. The conduct of the plaintiff was natural, and the story told by the cashier reasonable and probable. The plaintiff's business was the discount of paper. The evidence suggests no way in which there was any likelihood of information reaching the plaintiff of the dissolution of the Weston firm or of the notes having been issued for improper purposes. The cashier testified that the proceeds of the notes were drawn out by the checks of Ramsey, who was a witness and evidently not hostile to the defendants. No attempt was made to prove that Ramsey did not receive the amount of the notes. What then was to be left to the jury?—to arbitrarily find, without any evidence, that the plaintiff did not discount the notes, or that in some unexplained way it had acquired

N. Y. Rep.]

Statement of case.

knowledge of their character? We think not. The plaintiff on the evidence was entitled to a direction in its favor.

The judgment appealed from should be reversed and a new trial ordered, costs to abide the event.

PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, MARTIN and VANN, JJ., concur.

Judgment reversed, etc.

THE BANK OF THE MONONGAHELA VALLEY, Appellant, v.
CHARLES WESTON, as Executor of ABIAH WESTON, Deceased,
Respondent, Impleaded with Others.

1. APPEAL — UNANIMOUS AFFIRMANCE — EVIDENCE TO SUPPORT VERDICT. After unanimous affirmance by the Appellate Division of a judgment entered upon a verdict of a jury the question whether the verdict is supported by any evidence is not open to review by the Court of Appeals.

2. PARTNERSHIP — ACCOMMODATION INDORSEMENT — ESTOPPEL. A partner who has knowledge that a copartner is persistently using the firm name for the accommodation of others by indorsing notes in the name of the firm for purposes foreign to the partnership business is estopped from questioning the validity of a note bearing such an indorsement, although made after the dissolution of the partnership, where he took no effectual means to put a stop to the practice and did not publish or communicate the fact of the dissolution to the public or to parties who were giving credit to the firm name.

3. EVIDENCE — BAD FAITH. A bank is not chargeable with bad faith because it discounted notes at the rate of seven per cent per annum when the legal rate of interest was but six per cent.

Bank of Monongahela Valley v. Weston, 62 App. Div. 628, reversed.

(Argued June 18, 1902; decided October 7, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 15, 1901, affirming a judgment in favor of defendant entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

C. S. Cary for appellant. When a member of a firm knows of the unauthorized use of the firm name in the indorsement

of paper, it becomes his duty to stop it, and upon failure to do so he becomes estopped as to persons dealing with the paper in good faith and becomes liable for any loss they may incur. (Story's Eq. Juris. § 1546; *Walsh v. H. F. Ins. Co.*, 73 N. Y. 10; *Sheldon v. Eickemeyer*, 90 N. Y. 613; *F. & M. Bank v. B. & D. Bank*, 16 N. Y. 135; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 70; *Hope v. Lawrence*, 50 Barb. 259; *Niven v. Belknap*, 2 Johns. 589; *O. C. Bank v. De Puy*, 17 Wend. 47; *Messenger v. F. Nat. Bank*, 6 Daly, 190; *Bank of Batavia v. N. Y., L. E. & W. R. R. Co.*, 106 N. Y. 199; *Trustees, etc., v. Smith*, 118 N. Y. 634.) Plaintiff was the *bona fide* transferee of the note in question. (*Cheever v. P. R. R. Co.*, 150 N. Y. 59; *A. E. Nat. Bank v. N. Y. B. Co.*, 148 N. Y. 698; 1 Daniel on Neg. Inst. 388.) The fact that seven per cent interest was charged, when six per cent was the legal rate of interest, cannot affect the question of good faith. Usury is not pleaded. (*W. C. Bank v. Low*, 81 N. Y. 566; *Thorne v. Alcord*, 32 Misc. Rep. 460; *Nash v. White's Bank*, 105 N. Y. 243; 1 Daniel on Neg. Inst. §§ 777, 779, 819.)

J. H. Waring for respondent. The several indorsements were invalid as against the respondent's testator. (*Foot v. Sabin*, 19 Johns. 154; *Laverty v. Burr*, 1 Wend. 529; *Sweetzer v. French*, 56 Mass. 339; *Gansvoort v. Williams*, 14 Wend. 133; *Smith v. Weston*, 81 Hun, 87.) The plaintiff took the notes in suit charged with notice of the accommodation character of their indorsements. (*Nat. P. Bank v. G. A. N. W. & Co.*, 116 N. Y. 281; *Fielding v. Lahens*, 6 Abb. [N. S.] 341; *Stuhl v. Catskill Bank*, 18 Wend. 466; *Gansvoort v. Williams*, 14 Wend. 133; *Bank v. Cameron*, 7 Barb. 143; *Smith v. Weston*, 159 N. Y. 194; *Bank of Monongahela Valley v. Weston*, 159 N. Y. 201.) It cannot be claimed that the finding of the jury is contrary to or against the weight of evidence. (*Marden v. Dorothy*, 160 N. Y. 390; *Amherst College v. Ritch*, 151 N. Y. 282; *Szuchy v. Hillside C. & I. Co.*, 150 N. Y. 219.) The original note

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

was void for usury. It was dated and payable in the state of New York, and is subject to the laws of that state against usury. (*Jewell v. Wright*, 30 N. Y. 359; *Eastman v. Shaw*, 65 N. Y. 522; *Clark v. Sisson*, 22 N. Y. 312; *Newell v. Doty*, 33 N. Y. 83; *Miller v. Zimer*, 111 N. Y. 441; *Perkins v. Smith*, 116 N. Y. 441; *People v. Davenport*, 91 N. Y. 574.)

O'BRIEN, J. When this case was here upon a former appeal (159 N. Y. 201) we had to review exceptions taken by the plaintiff to a dismissal of the complaint at the trial. It now comes here in a different form, since there has been a verdict of a jury in favor of the defendants that has been unanimously affirmed below. Therefore, the question whether the verdict is supported by any evidence is not open to review in this court, but every other question of law properly raised at the trial is. It is quite impossible to peruse the record without being impressed with the difficulty of defending the judgment upon principles of natural justice or even upon the most technical rules of law. While this court is confined by the Constitution and the statute to the review of such other questions of law as appear upon the record, we must first know what the conceded or undisputed facts are, in order to apply the law to the exceptions taken at the trial:

The plaintiff is a West Virginia bank that is seeking to collect in the courts of this state certain commercial obligations which it holds against parties residing here. The action is upon two promissory notes, the first for \$6,500, dated December 15, 1892, payable four months from date, and the other for \$5,000, dated March 31, 1893, payable thirty days after date. Both notes were made by Edwin F. Curtis to the order of and indorsed by Weston Bros., a firm composed of three brothers, then extensively engaged in business and of unquestionable financial standing and credit. The plaintiff discounted these notes for the maker at the rate of seven per cent, paying to him the proceeds, and when due they were duly protested for non-payment. The questions in the case arise solely upon the answer of Abijah Weston, a member of

the firm that indorsed the paper, and who died subsequently to the joining of issue and after the case was decided in this court upon the former appeal. This appeal involves only his liability as one of the indorsers, or the liability of his estate, his executor having been substituted in his place as a defendant. His testimony, however, taken upon the former trial, including his acts and correspondence bearing upon the issues, appear in this record and constitute an important feature of the case as it was submitted to the jury.

The answer of this defendant, so far as it is important to refer to it here, was simply this: That on the 3d day of January, 1892, prior to the making or indorsing of the notes in question, the firm of Weston Bros. was dissolved, that neither of the notes in suit was made, indorsed or discounted in, about or on account of the partnership business, or the winding up of its affairs, but that his brother William W. Weston, another member of the firm, after the dissolution, fraudulently indorsed the paper in the firm name at the request and for the accommodation of the maker and without the knowledge, consent or authority of the other members of the firm, all of which the plaintiff had notice when it discounted the paper.

The issues or questions presented for trial upon the pleadings were these: (1) Whether the firm was in fact dissolved as to the plaintiff; (2) whether the plaintiff had any knowledge or notice of the dissolution when it took the paper; (3) whether the plaintiff was an innocent or *bona fide* holder of the paper within the law merchant.

The facts bearing upon these issues are undisputed and identical with the facts appearing in the record when the case was here on the former appeal. There was a formal paper executed by the three partners stating that the firm was dissolved on "this 5th day of January, 1892, by mutual consent," with a statement that the business would be continued at the same place by the "A. Weston Lumber Co." It is admitted that this notice of the dissolution was never published and that the plaintiff had no knowledge of the dissolution. The plain-

tiff's dealings with paper indorsed by the firm commenced long prior to the execution of this writing formally dissolving it and under circumstances quite significant upon the question of good faith. On the 26th day of May, 1891, the cashier of the bank at Olean, where the banking business of the firm was transacted, addressed a letter to the plaintiff's cashier inclosing a note of \$2,500 made by Curtis, the maker of the notes in question and indorsed by the firm, for discount for a third party named in the letter. Two days after the plaintiff's cashier replied to the letter saying that he had received the letter and note but that "the parties are all strangers to us. Do you regard the note as all O. K.?" To this the cashier of the Olean Bank, who knew all about the firm if any one did, replied immediately "we consider Weston Brothers good beyond question. They are probably worth from one to two million." The plaintiff discounted the note, which was renewed from time to time, and that note with others of the same character made and indorsed by the same parties constitute the consideration of the notes in question. If that note had not been renewed when due it would be difficult to suggest any defense that the firm or any of its members could make to a suit upon the indorsement. The transaction is important now only so far as it tends to show how and under what circumstances the plaintiff was induced to discount paper upon the faith of the firm indorsement. There is nothing in the record to show that anything subsequently came to the knowledge of the plaintiff calculated to impair in the least the effect of a recommendation coming from such a responsible source. It appears without any dispute, since the facts were testified to by Abijah Weston himself, that for ten years prior to the indorsement of the notes in question he knew that his brother, who made the indorsement on these notes, was using the firm name for the accommodation of others by indorsing notes in the name of the firm, outside the partnership business. He had warned him against this course of business several times and forbidden him to do it any more. He remonstrated with him against the consequences that might

result from such indorsements and even threatened to "post him" on account of this misuse of the firm name, but took no action to prevent it, relying generally upon his brother's promise to desist but which promise was always violated. The testimony on this point is collated and discussed fully in the opinion of this court upon the former appeal and it is not necessary to repeat it here since a general reference is sufficient for all the purposes of this appeal. The brother and member of the firm who was thus engaged for years in using the firm name to give credit to the paper of parties outside the partnership business was all the time acting or assuming to act as the agent of the firm. When one partner, with the knowledge of the other partners, uses the firm name and indorsement to give credit to others in matters foreign to the partnership business, and this course of conduct is allowed by the other partners to continue during a long series of years, the question must always arise as to how far the habitual exercise of such an agency or authority, originally irregular or even void, is cured by acquiescence or made binding upon the firm as such by the doctrines of negligence or estoppel, and this brings us to the exceptions taken to the charge of the learned trial judge in submitting the case to the jury.

The plaintiff's counsel requested the court to charge that when the defendant became aware of the persistent and continued use of the firm name by his brother, outside the business of the firm, it became his duty to take some public action for the protection of outside parties. The court refused to charge the request, and the plaintiff's counsel excepted. We think that the request embodied a correct and important principle applicable to the proofs in the case, and that affected the issue between the parties from various directions, and should have been charged. When spurious stock has been issued and put in circulation by the officer of a corporation, and the board of directors, through negligence, have failed to discover or prevent the fraud upon the public, the stock so fraudulently issued and put in circulation will, in the hands of an innocent holder, be binding upon the corporation. (N.

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

Y. & N. H. R. R. Co. v. Schuyler, 34 N. Y. 58.) This principle is equally applicable to a partnership when the members through negligence permit one of its number to indorse and put notes or commercial paper in circulation that purports upon its face to be genuine and the obligations of the firm, when it is in fact fraudulent or for the accommodation of others outside the partnership business. The right of one partner to use the firm name rests upon those rules and principles applicable to the relations of principal and agent. The principal will be often bound by the act of his agent in excess or abuse of his actual authority as between the principal and third persons who believing and having the right to believe that the agent was acting within and not exceeding his authority would sustain loss if the act was not considered that of the principal. The doctrine is established to prevent fraud, and proceeds also upon the ground that when one of two innocent persons must suffer from the act of a third person, he shall sustain the loss who has enabled the third person to do the injury. (*Walsh v. Hartford Fire Ins. Co.*, 73 N. Y. 10.) When a partnership firm having knowledge of the continued and persistent conduct of one of its members in lending the credit of the firm to others by means of accommodation paper, neglects to promptly and actively condemn the unauthorized act, and to seek judicial redress after knowledge of the committal of it, that will be deemed an acquiescence in it, and if innocent third persons have been led thereby to put themselves in a position from which they cannot be taken without loss, if the act were held invalid, the other partners will be estopped from questioning it. (*Sheldon H. B. Co. v. Eickemeyer H. B. M. Co.*, 90 N. Y. 613.) The act of one partner who without authority places the firm name upon accommodation paper will not bind the firm when the paper is held by parties having knowledge of the consideration, but when negotiated to a *bona fide* holder the firm is precluded from questioning the authority of the partner and is effectually bound. (*Farmers & Mechanics' Bank v. Butchers & Drovers' Bank*, 16 N. Y. 135.)

There are numerous other cases and authorities that deal with the unauthorized or fraudulent acts of agents that mislead innocent third parties to their prejudice that have been held to be binding upon the principal. The rule is not always expressed in the same form of words, but however stated the application to this case is apparent. These expressions have all the force of maxims to govern the conduct of men under circumstances such as the defendant was placed in when knowledge of the misconduct of his partner was brought home to him. The knowledge that he then acquired, or which is to be imputed to him, was sufficient to alarm the most serene confidence, since it appears that during ten years prior to the date of the notes in question paper of the same character as that now in question and put in circulation in the same way to the amount of over one million dollars passed through the bank where the defendant kept his account, and yet the defendant took no effectual means to put an end to the practice of lending the firm name for purposes foreign to the partnership business, and what is more remarkable still when the partnership was dissolved, as between the members themselves, the fact was not published or communicated in any way to the public or to parties who were giving credit to the firm name.

We think that the plaintiff was entitled to have the principles stated applied to the facts of the case. The request referred to above was repeated in various forms and with more or less modification of language, but in the main was refused. It is a general principle of law applicable to this class of cases that if a person either by words or conduct manifests his consent to an act which has been done he cannot question the legality of the act. If he has an interest to prevent an act being done, but so acquiesces in it as to induce a reasonable belief that he consents to it and the position of others is changed by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had it been done by his previous license. In equity where a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

when conscience requires him to be silent. (Story's Eq. Juris. [Redf. ed.] § 1546; *Niren v. Belknap*, 2 Johns. 589; *Onondaga Co. Bank v. De Puy*, 17 Wend. 47; *Bank of Batavia v. N. Y., L. E. & W. R. R. Co.*, 106 N. Y. 199; *Trustees, etc., of Brookhaven v. Smith*, 118 N. Y. 634; *Griswold v. Haven*, 25 N. Y. 600; *Hope v. Lawrence*, 50 Barb. 259; *N. Y., N. H. & H. R. R. Co. v. Schuyler*, *supra*.) It was necessary for the defendant to show that the plaintiff had actual knowledge or was chargeable with knowledge of two important facts, namely, the misuse by the other partner of the firm name before or after the dissolution and the actual or formal dissolution by the partners as between themselves. The formal act of dissolution had no effect upon the plaintiff until it was chargeable with knowledge of the fact.

The plaintiff's counsel requested the court to charge that the discount of the notes at the rate of seven per cent when the legal rate of interest in the state where the bank was located was but six per cent, is no evidence whatever of bad faith on the part of the plaintiff in discounting the paper, it appearing from the undisputed evidence that it was the plaintiff's usual rate of discount. The court refused to so charge but left the question to the jury and the plaintiff's counsel excepted. The question raised by this exception is one of law. The court was requested to hold that certain evidence was not competent to prove a certain material fact which was in issue between the parties. We think that the evidence did not prove or tend to prove the fact. The defense of usury was not interposed and that question is not in the case. The sole question is whether the retention by the plaintiff of one per cent in addition to the ordinary and lawful rate of discount was a circumstance to show bad faith on the part of the holder of the notes, or in other words to show that the plaintiff was not a *bona fide* holder. It has been held that when paper is purchased at half the face value the price paid was a circumstance bearing upon the innocence or good faith of the purchaser. (*Vosburgh v. Diefendorf*, 119 N. Y. 357.) It may have been held in other cases that the retention of a large

sum from the face of the note was a circumstance to be considered upon the question of bad faith in connection with other suspicious facts, but there the discount was at the rate of fifteen to eighteen per cent. (*Cunajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191.) It has never been held that such an insignificant sum as one per cent when retained could, standing alone, affect the good faith of the transaction. The case of *Hall v. Wilson* (16 Barb. 548), though undoubtedly a very extreme authority, does not go to that extent. Moreover what was said in that case was in support of the defense of usury where the note was never delivered or had any inception, but was stolen from the maker and purchased at a discount from the thief by the holder under circumstances tending to show negligence or bad faith. The case cannot, we think, be regarded as an authority to justify the trial court in refusing to charge the request now under consideration. The rights of the holder of commercial paper wrongfully or fraudulently put in circulation were stated in a recent case in this court. (*Cheever v. Pittsburgh, S. & L. E. R. R. Co.*, 150 N. Y. 59.) It was there held that the circumstances under which such paper is taken or purchased by a third party were to be tested by the simple rule of common honesty and good faith. Applying the doctrine of that case to the one at bar it is difficult to find anything in the record in the least suggestive of bad faith on the part of the plaintiff when it discounted the notes in question. Such a large portion of the moneyed capital of the country is employed in making loans by discounting bills and notes, that it would be a harsh and unreasonable rule to hold that when a bank, discounting commercial paper under such circumstances as the plaintiff discounted the notes in question, attempts to collect it, a rate of discount such as was reserved in this case may be submitted to a jury as a circumstance to impeach the position of the plaintiff as a *bona fide* holder.

The judgment should be reversed and a new trial granted, costs to abide the event.

PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN and CULLEN, JJ., concur.

Judgment reversed, etc.

SYLVESTER L. MALONE, as Administrator of SYLVESTER MALONE, Deceased, Respondent, v. SAINTS PETER and PAUL'S CHURCH, BROOKLYN, E. D.

1. APPEAL — CERTIFIED QUESTION INVOLVING QUESTION NOT CERTIFIED CANNOT BE ANSWERED BY COURT OF APPEALS. A question certified to the Court of Appeals by the Appellate Division: "Has the court in a suit upon a common-law cause of action, brought by an administrator, jurisdiction to order a reference of all the issues in the action to a referee to hear and determine the same where the administrator opposes the granting of such order and demands a trial by jury?" cannot be answered correctly either in the negative or affirmative where the questions as to whether a trial of the case will necessarily involve the examination and auditing of a long account, or as to whether independent issues are raised by the pleadings, have not been certified; and an appeal from an order of the Appellate Division reversing an order of the Special Term granting a compulsory reference, upon the ground that an administrator being a party he has the constitutional right to demand a jury trial, must be dismissed.

2. COMMON-LAW ACTION BY EXECUTOR OR ADMINISTRATOR — COMPULSORY REFERENCE WHEN EXAMINATION OF LONG ACCOUNT IS INVOLVED. The constitutional and legislative provisions relating to the question as to whether a compulsory reference may be ordered in a common-law action brought by an executor or administrator reviewed, and it seems that if independent issues are raised by the pleadings or issues, the determination of which may render an accounting unnecessary, they should be first tried before a jury, and if upon its determination an accounting is necessary, and it appears that the trial will necessarily involve the examination and auditing of a long account, the plaintiff is not entitled to a jury trial, but the court has power to order a compulsory reference.

Malone v. Saints Peter and Paul's Church, 69 App. Div. 420, appeal dismissed.

(Argued June 12, 1902; decided October 21, 1902.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the second judicial department, entered March 11, 1902, which reversed an order of Special Term referring the issues in the action to a referee to hear and determine the same.

The nature of the action, the question certified and the facts, so far as material, are stated in the opinions.

James M. Gray, Herbert T. Ketcham and Joseph E. Owens for appellant. The distinction between cases where the right to trial by jury existed and was preserved "inviolable forever," and cases where it was not so preserved, is a distinction depending on the nature of the case and not upon its incidents. The Constitution of 1777, construed together with the act of 1768, does not limit the power to order a compulsory reference to those cases which in every detail correspond to the statute, but leaves the legislature free to provide for a reference in all cases of the generic class in which the power to refer was granted by that statute. (*Wynehamer v. People*, 13 N. Y. 378; *Colon v. Lisk*, 153 N. Y. 188; *Morris v. People*, 1 Park. Cr. Rep. 441; *Plato v. People*, 3 Park. Cr. Rep. 586; *Riggs v. Shannon*, 27 Abb. [N. C.] 456; *Byers v. Commonwealth*, 42 Penn. St. 89; *Stilwell v. Kellogg*, 14 Wis. 461; *Mead v. Walker*, 17 Wis. 189; *Howe v. Treasurer of Plainfeld*, 37 N. J. L. 145; *Commissioners v. Seabrook*, 2 Strobb. 560.) If the question certified is answered "no" our whole system of compulsory references in actions at law becomes obnoxious to the fourteenth amendment to the Federal Constitution, and to sections 1 and 6 of article 1 of the Constitution of New York, which embody the principle of equality before the law. (*Hays v. Missouri*, 120 U. S. 68; *Bush v. Kentucky*, 107 U. S. 110; *Strander v. West Virginia*, 100 U. S. 303; *People ex rel. v. School Board*, 161 N. Y. 598; *People ex rel. v. Gallagher*, 93 N. Y. 438; *People v. King*, 110 N. Y. 418; *Barbier v. Connolly*, 113 U. S. 27; *G. C. & S. F. R. R. Co. v. Ellis*, 165 U. S. 150; *State v. Loomis*, 115 Mo. 307; *Missouri v. Lewis*, 101 U. S. 22.) The Constitution in force is the Constitution of 1894 and not that of 1777. Hence "heretofore used" refers to 1894 and not to 1777. (*Wynehamer v. People*, 13 N. Y. 378; *Riggs v. Shannon*, 27 Abb. [N. C.] 456.)

Laurence E. Malone for respondent. The question whether an action is referable without consent of both parties is to be determined from the complaint alone. (*Steck v. C. F. & I.*

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

Co., 142 N. Y. 236; *Cassidy v. McFarland*, 139 N. Y. 201; *Spence v. Simis*, 137 N. Y. 616; *A. R. Mills v. Dwyer*, 26 App. Div. 101.) The right of trial in the mode and by the tribunal prescribed by law is a substantial right and plaintiff cannot be deprived of it against his consent. (*Kain v. Delano*, 11 Abb. Pr. [N. S.] 29.) The court, in a suit upon a common-law cause of action brought by an administrator, has no jurisdiction to order a reference of all the issues in the action to a referee to hear and determine the same when the administrator opposes the granting of such order and demands a trial by jury. (*Steck v. C. F. & I. Co.*, 142 N. Y. 236.) The courts, in construing the Constitution, have nothing to do with the argument *ab inconvenienti*. (*People v. Morrell*, 21 Wend. 583; *Newell v. People*, 9 N. Y. 83.)

HAIGHT, J. The question certified to this court by the Appellate Division is as follows: "Has the court in a suit upon a common-law cause of action, brought by an administrator, jurisdiction to order a reference of all the issues in the action to a referee to hear and determine the same when the administrator opposes the granting of such order and demands a trial by jury?" The court in this case ordered a reference upon the ground that the trial would involve the examination of a long account. Did the court have jurisdiction to make such an order?

In order to answer the question certified, it becomes important to examine the legislation upon the subject. The first law to which attention has been drawn is entitled "An act for the better determination of personal actions depending upon accounts." It was passed December 31st, 1768, and, so far as is material to the question under consideration, provides as follows:

"Whereas, instead of the ancient Action of Account, Suits are of late, for the sake of holding to Bail, and to avoid the Wager of Law, frequently brought in Assumpsit, whereby the Business of unraveling long and intricate Accounts most proper for the deliberate Examination of Auditors, is now

cast upon Jurors, who, at the Bar, are more disadvantageously circumstanced for such Services; and this Burden upon Jurors is greatly increased, since the Law made for permitting Discounts in Support of a Plea of payment; so that by the Change of the Law and practice above mentioned the suits of Merchants and others upon long Accounts are exposed to erroneous Decisions, and Jurors perplexed and rendered more liable to Attaints; and by the vast Time necessarily consumed in such trials other Causes are delayed, and the general Course of Justice is greatly obstructed.

"BE IT THEREFORE ENACTED by his Excellency the Governor, the Council, and the General Assembly, and it is hereby enacted by the Authority of the same, that whenever it shall appear probable in any Cause depending in the Supreme Court of Judicature of this Colony (other than such as shall be brought by or against Executors or Administrators) that the trial of the same will require the Examination of a Long Account, either on one side or the other, the said Court is hereby authorized with or without the Consent of Parties, to refer such Cause by Rule to be made at Discretion to Referees." (4 Colonial Laws, page 1040.)

This act by its own provision was to continue in force until the first day of January, 1771, and no longer. It was, however, revived by the general assembly in February, 1771, and continued in force until the first day of February, 1780. (Laws of N. Y. [Van Schaack ed.] vol. 2, 1691 to 1773, p. 607.) From 1780 to 1788 I do not find that any statute was in force upon the subject; but in that year the legislature, by chapter 46, section 2, provided: "That whenever it shall appear probable in any cause depending in any court of record in this state, *as well where an executor or executors, administrator or administrators, is, are or may be party or parties*, as otherwise that the trial of the same will require the examination of a long account, either on one side or the other, the said court at any time after issue is joined in such cause, is hereby authorized with or without the consent of the parties to refer such cause by rule to be made

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

at discretion to referees." In the year 1801, by chapter 90, section 2, this statute was re-enacted, and the same provision was carried into the revision of 1813 by chapter 56, section 2. It thus remained until the revision of 1828, when it was changed to read: "Whenever a cause shall be at issue in any court of record, and it shall appear that the trial of the same will require the examination of a long account on either side, such court may, on the application of either party, or without such application, order such a cause to be referred to three impartial and competent persons." (2 R. S. [2d ed.] 305, § 40.) This provision with some slight immaterial change has been carried into our Code of Civil Procedure, and remains the law until the present day. It will be observed that prior to the legislation of 1788 the statute excepted actions by or against executors and administrators; but that by the laws of that year, actions by or against executors or administrators were expressly included in the provision giving the court the power to order a reference.

The Constitution of 1777 provided that "Trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever." (Article 41.) In the Constitution of 1821 the provision was changed so as to read as follows: "The trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever." And in this form it was continued in the Constitutions of 1846 and 1894. It is now contended that the act of 1788 authorizing a reference in actions by or against executors or administrators was violative of the Constitution of 1777, for the reason that it deprived the parties of the right of a trial by jury, and that by reason thereof all of the subsequent revisions of that act have been unconstitutional and, therefore, void. This proposition, if sound, is far reaching in its consequences. If one party is entitled to a trial by jury, the same privilege must be accorded to the other party in an action, in order that equality before the law may be maintained. (Const. of U. S. art. 14, § 1.) If either party may object to a reference, it follows that no reference can

be ordered except upon the stipulation of all the parties in the action.

It is a matter of common knowledge that reference, in actions of the character of that now before us, has been ordered in a great many cases as far back as the memory of any man now living extends, and I think we may assume that such references have been ordered ever since the passage of the act of 1788. No decision has ever been made adjudging the provisions of that act to be in conflict with the provisions of the Constitution, but, on the contrary, it has been acted under ever since upon the assumption that it was constitutional. The Constitution of 1777 provided that a trial by jury, in all cases in which it has been heretofore *used*, shall remain inviolate forever. What is the meaning of the word "used?" Does it have reference to a statute existing upon the subject, or to a custom long in use? The unwritten common law of England was largely made up of customs which had existed for a period "whereof the memory of man runneth not to the contrary." This law was in force in the colony. There was no statute specifying the cases in which parties were entitled to a trial by jury, and the word "used," therefore, must of necessity have referred to the customs then existing. What was the custom at that time? It is said that it was to try actions by or against executors or administrators involving the examination of long accounts before a jury. I do not understand such to be the fact.

The settlement of the estates of deceased persons from very early times has devolved upon other than common-law courts. Our Surrogate's Court dates back to the act of March 16th, 1778. Before the Revolution, the powers and duties of the surrogate vested in the colonial governor who, by virtue of his office, was judge of the Prerogative Court, or the Court of Probates, as it was sometimes called. When the government of this province was committed to Governor Nicolls, by the Duke of York, there was framed what was afterwards known as "The Duke's Laws." Under these laws the province was divided into three ridings, in each of which

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

was a Court of Sessions, composed of the justices of the peace residing therein, who held a session twice a year. To this court was committed the probate of wills, the appointment of executors and administrators, and the appointment of guardians; but if the estate exceeded one hundred pounds, all proceedings upon the probate of wills and all records in cases of administration had to be transmitted to the secretary of the province where they were required to be recorded, and where letters testamentary, of administration, and of the final discharge of executors and administrators, were granted by the governor under seal of the province. In 1686 instructions were transmitted to Governor Dongan, directing him to add to the jurisdiction of the governor, as judge of the Prerogative Court, the ecclesiastical jurisdiction of the archbishop of Canterbury, and three years later there was also added the ecclesiastical jurisdiction of the bishop of London, so far as it related to testamentary matters or the administration of the estates of intestates. Subsequently, when the colony became more extensively settled, the governor appointed deputies in the different localities, to whom were delegated the power to act for him in such cases, and these deputies subsequently became known by the title of surrogates. They took the proof of wills, issued letters of administration, appointed guardians for minors, settled and adjusted accounts of executors and administrators, compelled the payment of debts and decreed the final distribution of estates. This jurisdiction was derived chiefly from the "Duke's Laws" and the added jurisdiction of the ecclesiastical courts.

In 1743 an act was passed, under which persons entitled to a share in the estate of deceased persons were authorized to bring actions against executors and administrators to compel the payment due them of their shares of the estate, and if a plea of want of assets was entered, the court was empowered to appoint auditors to examine the accounts of the executors or administrators and to determine the amounts remaining in their hands. This law continued in force down to the adoption of the Revised Statutes. (Laws of N. Y., Smith and

Livingston [1st ed.], 316; Street's N. Y. Council of Revision, 281.) The provisions of this act and the jurisdiction exercised by the Court of Chancery furnished a more effectual remedy than the Prerogative Court afforded, and the practice of accounting in the Court of Chancery was more generally resorted to, except when an executor or administrator filed his account with a view of obtaining his discharge, the accounting took place before the Prerogative Court.

Disputed claims presented against the estates of deceased persons were ordinarily determined by arbitrators, and this practice, I presume, suggested to the revisers our modern statute providing for an offer of reference of such claims before action brought. But these claims and those made by executors and administrators against other persons, as well as actions by or against guardians, were determinable in the courts, and where they involved the adjusting of long accounts by an action for an accounting.

One of the most ancient forms of action at common law was the action of account. Formerly it lay only in cases where there was either a privity in deed as against a bailiff or receiver, or a privity in law as against a guardian in socage, and so strictly was the privity of contract construed that an action did not lie by or against executors or administrators, but by act of Parliament it was first extended to the executors of a merchant (13 Edw. III, ch. 23), then to executors of executors (25 Edw. III, ch. 5), and then to administrators (31 Edw. III, ch. 11), and finally by 4 Anne, ch. 16, it was extended to executors and administrators, and by the same statute arbitrators were given the power to administer oaths to the witnesses. Subsequently this form of action fell into almost total disuse in England, chiefly for the reason that the Court of Chancery assumed jurisdiction in matters of account, and it was found that that court furnished to parties a more effectual and speedy remedy, and, consequently, it was more frequently resorted to in such cases, but in this country the action for an account, with some modifications, has continued in use until the present time and actions

between copartners and personal representatives of deceased persons against the surviving members of a firm are not uncommon. It was continued as to executors and administrators by the Revised Statutes: "Actions of account and all other actions upon contract, may be maintained by and against executors, in all cases in which the same might have been maintained, by or against their respective testators." The next section includes administrators. (2 R. S. 113, §§ 2, 3.) It is thus apparent that cases of this character were maintainable as an action for an account ever since the fourth of Anne, and that that form of action was resorted to, except in cases in which the action was brought in the Court of Chancery. The practice adopted may be briefly stated: If issues were joined raising other questions than the amount due, such issues were tried by the jury and if found against the party raising them the judgment entered was *quod computet*. Thereupon an interlocutory judgment was entered and auditors were appointed to take the account. The history of this form of action and the practice thereunder is so clearly stated by Blackstone that, I think, it should here be repeated: "If no account has been made up, then the legal remedy is by bringing a writ of *account de computo*; commanding the defendant to render a just account to the plaintiff, or show the court good cause to the contrary. In this action, if the plaintiff succeeds, there are two judgments: the first is that the defendant do account *quod computet* before auditors appointed by the court; and when such account is finished then the second judgment is that the defendant pay the plaintiff so much as he is found in arrear. This action, by the old common law, lay only against the parties themselves and not their executors; because matters of account rested solely on their own knowledge. But this defect, after many fruitless attempts in Parliament, was at last remedied by statute 4 Anne, c. 16, which gives an action of account against executors and administrators. But, however, it is found by experience that the most ready and effectual way to settle these matters of account is by bill in a

court of equity, where a discovery may be had upon the defendant's oath without relying merely upon the evidence which the plaintiff may be able to produce." (3 Bl. Com. 164.) In the case of *McMurray v. Rawson* (3 Hill, 59, 68) COWEN, J., says, with reference to this practice and the independent issues raised, "if found against the defendant or he suffer default, the judgment is *quod computet*; but the jury cannot take the account. The judgment is but interlocutory and the cause goes to auditors, before whom a new course of pleading might be taken up at common law." This practice, except as to the change made in 1788 in which referees took the place of auditors, appears to have continued until the Revised Statutes, in which it was continued by the provision: "When an action of account shall be brought * * * and judgment shall be rendered that the parties account, or that the defendant account to the plaintiff, the cause shall be referred to referees in the same manner, and subject to the same provisions as herein prescribed in case of a long account." (2 R. S. [2d ed.] 306, § 50. See, also, *Kelly v. Kelly*, 3 Barb. 419, 423; 1 Mallory Entr. 67, 68; 1 Brownl. Entr. 51, 53; *Baxter v. Hozier*, 5 Bing. N. C. 288; 1 Bac. Ab. 43, Of Accounts of Auditors; *Brick's Estate*, 15 Abb. Pr. 12; 1 Story's Com. on Equity, §§ 441, 447.)

It is thus apparent that the practice of determining accounts in this class of cases by auditors was in existence long before the adoption of the Constitution of 1777; and it is quite possible that this explains the reason for excepting executors and administrators from the provisions of the act of 1768, it not then being thought wise to dispense with the auditors. In 1788, however, executors and administrators were placed upon the same footing as other suitors and the reference to referees, instead of auditors, was authorized. This statute did not, therefore, deprive parties of the right to a trial by jury in cases in which the trial by jury had theretofore been used.

A compulsory reference should not be ordered unless it clearly appears that the trial will necessarily involve the examination and auditing of a long account. If it does so appear

a reference should be ordered. It is not possible for jurors to carry in mind numerous items composing a long account, and determine intelligently the amount that should be awarded to either party. This difficulty was recognized in the preamble of the act of 1768, and it has been confirmed by experience. If independent issues are raised by the pleadings or issues the determination of which may render an accounting unnecessary, they should first be tried in the proper forum, if in a common-law case before a jury, and if, upon their determination an accounting is necessary, it should be referred to a referee or referees to determine the same.

The question as to whether the trial of this case will necessarily involve the examination and auditing of a long account, or as to whether independent issues are raised by the pleadings, have not been certified to us. The question, as certified, cannot be answered correctly either in the negative or affirmative, for the reason that issues may be raised in a pleading which are independent of those involving the examination of a long account.

Under the provisions of the Code we are limited in our review to the questions certified, and without deciding the questions not certified we cannot determine whether the order should be affirmed or reversed. Under the circumstances, therefore, the appeal should be dismissed, the costs to abide the final result of the action.

VANN, J. (dissenting). This action was brought to recover the sum of \$994.50, being the unpaid portion of the annual salary of the plaintiff's intestate as priest of the defendant, a religious corporation, as well as upon an account for moneys lent, paid out and expended. The answer, after putting at issue substantially all the allegations of the complaint, sets forth a counterclaim for moneys had and received. Upon defendant's motion an order was made at Special Term referring all the issues to a referee to hear and determine the same, upon the ground that a long account was involved. The plaintiff, as administrator, opposed the motion for a reference,

demand a trial by jury and appealed from the order to the Appellate Division, where it was reversed upon the ground that a compulsory reference cannot be had in a common-law action when an executor or administrator is a party, because the Constitution gives the right of trial by jury in such cases. The Appellate Division, however, certified the following question to this court: "Has the court in a suit upon a common-law cause of action, brought by an administrator, jurisdiction to order a reference of all the issues in the action to a referee to hear and determine the same when the administrator opposes the granting of such order and demands a trial by jury?"

In order to thoroughly understand the nature and extent of this question it is necessary to read it in connection with the pleadings. (*Baxter v. McDonnell*, 154 N. Y. 432.) When thus read the question means, can such issues as are joined by the pleadings in this action be referred when the plaintiff, a sole administrator, opposes the application and demands a trial by jury? If the liability of the defendant was established or conceded and the only issue was the amount of the recovery, a question would be presented that I shall not discuss, because it is not before us. The issues referred by the order of the Special Term involved the liability of the defendant to the plaintiff for the unpaid salary as well as upon an account and also the liability of the plaintiff to the defendant upon the cause of action alleged in the counterclaim.

The present Constitution of this state provides that "The trial by jury, in all cases in which it has been heretofore used shall remain inviolate forever." (Art. I, § 2.) The provision in the Constitution of 1846 was precisely the same. The language of the Constitution of 1777 was as follows: "Trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever." (Art. 41.)

At the time our first Constitution was adopted, the following statute was in force, it having been first enacted in 1768

for a limited period, and in 1771 revived and extended until February 1st, 1780: "WHEREAS instead of the antient Action of Account, Suits are of late, for the sake of holding to Bail, and to avoid the Wager of Law, frequently brought in Assumpsit, whereby the Business of unraveling long and intricate Accounts, most proper for the deliberate Examination of Auditors, is now cast upon Jurors, who, at the Bar, are more disadvantageously circumstanced for such Services; and this Burden upon Jurors is greatly increased, since the Law made for permitting Discounts in Support of a Plea of payment; so that by the Change of the Law and practice above mentioned the Suits of Merchants and others upon long Accounts are exposed to erroneous Decisions, and Jurors perplexed and rendered more liable to Attaints; and by the vast Time necessarily consumed in such Trials other Causes are delayed, and the general Course of Justice is greatly obstructed.

"BE IT THEREFORE ENACTED, etc., that whenever it shall appear probable in any Cause depending in the Supreme Court of Judicature of this Colony (*other than such as shall be brought by or against Executors or Administrators*) that the trial of the same will require the Examination of a Long Account, either on one side or the other, the said Court is hereby authorized with or without the Consent of Parties, to refer such Cause by Rule to be made at Discretion, to Referees, * * * ." (2 Van Schaack's Laws of New York, ch. 1363; Id. ch. 1478; 4 Colonial Laws, p. 1040; 5 id. 195.) In 1772 this statute was extended to all the common-law courts of the colony, and in 1788 it was revived by the legislature of the state, but the exception as to executors and administrators was omitted, and it was expressly enacted that the act should apply to such parties, *eo nomine*. (5 Colonial Laws, p. 293, L. 1788, ch. 46.)

According to section 1013 of the Code of Civil Procedure, the right to refer an action involving the examination of a long account is general and there is no exception as to executors or administrators. The Revised Statutes contained

a similar provision. (3 R. S. [6th ed.] 520.) For a more specific history of legislation upon the subject and an able discussion of the power to refer, reference is made to the opinion of Judge EARL in *Steck v. Colorado F. & I. Co.* (142 N. Y. 236), which is relied upon by the respondent as controlling.

It is argued in behalf of the appellant that the word "cases," as used in the section of the Constitution relating to trials by jury, means classes of cases and not particular instances; that being used in a generic and not in a specific sense, it relates to the nature of the case, not to its incidents, and hence whenever the nature of an action is such that it cannot well be tried before a jury, the legislature has power to authorize the courts to refer.

This is an enticing argument, which, if adopted by us, would lead to a result not only convenient in this and similar cases but in accord with the practical construction of the legislature for a long period of years. I find great difficulty, however, in yielding to it. The first Constitution established trial by jury "in all cases in which it hath heretofore been used in the colony of New York," and as it had always been used in actions at law when an executor or administrator was a party, with one unimportant exception, the intention of the framers to continue that rule seems clear and conclusive. In the colony, as we have held, there was no authority to refer actions at law except the ancient and virtually obsolete action of account, to be noticed hereafter, unless as authorized by the act of 1768. (*Steck v. Colorado F. & I. Co.*, 142 N. Y. 236.) As early as 1683 it was provided by the Charter of Liberties and Privileges granted by the Duke of York to the inhabitants of New York "that all trials shall be by the verdict of twelve men." (Charter, Appendix No. 2, 2 Laws of 1813; 1 Colonial Laws, p. 111.) We further held in the *Steck* case that the act of 1768 was virtually a part of the Constitution of 1777, so far as the power to refer actions at law is concerned. This is apparent not only from the prevailing opinion, but is emphasized by the following quotation from the

N. Y. Rep.]

Dissenting opinion, per VANN, J.

dissenting opinion: "The act of 1768 excepted from its operation suits 'brought by or against executors or administrators.' This exception was expressly abrogated in the act of 1788 and the subsequent statutes of the state. But this abrogation of the exception was inoperative and in violation of the Constitution, if you say that no compulsory reference can be authorized in any case not referable under the colonial laws, although the case is within the principle and policy upon which these laws were based. If the Constitution restricts, as is claimed, the power of compulsory reference to the exact cases specified in the colonial act of 1768, then I perceive no escape from the conclusion that whenever now an executor or administrator is a party to an action, it cannot be compulsorily referred, although the action may be on contract and involves a long account on either or both sides." (Id. p. 259.)

When the Constitution of 1777 was framed, as the history of that period shows, the right of trial by jury was regarded as of supreme importance, and the framers provided that, as theretofore used, it should remain inviolate forever. The only measure of usage was the universal rule that all actions at law should be tried before a jury, except the antiquated and worn-out action of account, even then seldom resorted to, and the act of 1768. That act contained the only relaxation of the general rule, and it expressly excepted from its operation the representatives of dead men who could not protect themselves. The language of the Constitution shows an unmistakable intention to establish in the state the rule previously existing in the colony, and that rule did not permit the reference of such actions. Unless the act of 1768 was virtually embodied in the Constitution, as we held in the *Steck* case, there was no authority to refer any action at law whatever, except that "most difficult, dilatory and expensive action," known as the technical action of account, which could be brought only against bailiffs, receivers and guardians in socage and at last against merchants. Judge Bronson, writing sixty years ago, said that only two actions of that

kind had ever been brought during the history of the state, and that no more than a dozen such had been brought in England during the two centuries then preceding. (*McMurray v. Rawson*, 3 Hill, 59, 62.) The rule of the colony was to try every common-law action, except the action of account, before a jury until the change was made in 1768. Until then it was unimportant whether the action involved the examination of a long account or not, for it could not be tried before auditors or referees except by the consent of the parties, although a computation of the amount due could be made by a referee, after the liability had been established. Whether the trial was long, inconvenient and expensive, or whether the action was of such a nature that a jury could not do justice to the parties, still it could not be referred without consent until the statute, which does not affect executors or administrators, changed the rule. The right to a trial by jury, as used in the colony when the Constitution of 1777 was adopted, applied to all actions at law brought by or against executors or administrators. It was only because the act of 1768 was virtually a part of the Constitution that there was authority to refer any action at law, with the unimportant exception of the disused action of account. If it was a part of our first Constitution, the express exception as to executors and administrators still exists, for it goes without saying that the provision of that instrument relating to the subject has continued with the same meaning and almost in the same words in every Constitution adopted since. I think that one of the most important and permanent sections of the fundamental law of the state and one deemed more important when it was first adopted in 1777 even than at the present time, should not be given a loose or strained construction in order to meet an emergency or promote convenience, nor bent so as to yield to usage however venerable. "No encouragement should be given to the belief, now widely prevalent, that if an unconstitutional law can be acted upon long enough to make it a hardship to declare it void, the courts will not interfere." The maxim *ita lex scripta est* should control, and the words of the Constitu-

N. Y. Rep.]

Statement of case.

tion should not be departed from, but a direct, simple and exact construction given, regardless of custom or convenience.

The order appealed from should be affirmed, with costs, and the question certified answered in the negative.

PARKER, Ch. J., GRAY, CULLEN and WERNER, JJ., concur with HAIGHT, J.; O'BRIEN, J., concurs with VANN, J.

Appeal dismissed.

CEILAM N. SPITZER et al., Appellants, v. THE VILLAGE OF FULTON, Respondent.

VILLAGES — CONSTITUTIONAL LAW — THE STATUTE (L. 1898, CH. 269, ART. 2, § 5) REQUIRING THAT A VOTER UPON A PROPOSITION TO ESTABLISH WATER WORKS IN THE VILLAGE OF FULTON AND ISSUE BONDS THEREFOR, OR HIS WIFE, MUST BE A TAXPAYER, IS NOT UNCONSTITUTIONAL. The provision of the statute (L. 1898, ch. 269, art. 2, § 5) defining the qualifications of voters in the village of Fulton and requiring that a voter, in order to vote upon a proposition that the village establish a system of water works and issue bonds for that purpose, "must be entitled to vote for an officer, and he or his wife must also be the owner of property in the village, assessed upon the last preceding assessment roll thereof," is not in conflict with section 1 of article 2 of the Constitution of the state, defining the qualifications of electors of the state and providing that such electors shall be entitled to vote "for all officers that now are or hereafter may be elective by the people; and upon all questions which may be submitted to the vote of the people;" since such provision must be construed in connection with section 1 of article 12 of the Constitution, which provides that "It shall be the duty of the Legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and in contracting debt by such municipal corporations," and so construed, the first provision is general and relates only to the general governmental affairs of the state; the latter is local and relates to the business or private affairs of the municipalities specified, and the statute is in accordance with the established policy of the state to limit the right of suffrage as to the business or financial affairs of its various villages to the taxpayers of the municipality, and is fully justified by, and not in conflict with, the provisions of the organic law.

Spitzer v. Village of Fulton, 61 App. Div. 612, affirmed.

(Argued October 13, 1902; decided October 21, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 15, 1901, upon an order affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Jordan J. Rollins for appellants. The appellants are entitled to recover from the respondent the amount of their deposit made in pursuance of the respondent's call for bids, in the event that the respondent, at the time and place fixed by the offer and acceptance, undertook to deliver only alleged bonds which were invalid or of doubtful validity and did not tender valid and effectual bonds. (*Listman v. Hickey*, 143 N. Y. 630; 65 Hun, 8; *Dillon on Mun. Corp.* [3d ed.] § 938; *Forster v. Winfield*, 142 N. Y. 327; *City of Great Falls v. Theis*, 79 Fed. Rep. 943; *Moore v. Williams*, 115 N. Y. 586.) The alleged bonds which were tendered by the respondent to the appellants were invalid and absolutely void. The act, by authority of which the village bonds under consideration purport to have been issued, is unconstitutional. (Const. of N. Y. art. 2, § 1; *Page v. Allen*, 58 Penn. St. 338; *People ex rel. v. Potter*, 47 N. Y. 375; *Matter of Woolsey*, 95 N. Y. 135; *Matter of Gage*, 141 N. Y. 112; *Green v. Shumway*, 39 N. Y. 418; *Allison v. Blake*, 57 N. J. L. 6; *Kimball v. Hendee*, 57 N. J. L. 307; *Chamberlain v. Board of Education*, 57 N. J. L. 605.)

Nevada N. Stranahan for respondent. The subdivision of section 5 of the village charter, imposing a property qualification for voters upon a proposition, in no wise violates or contravenes the Constitution of the state. (Const. of N. Y. art. 2, § 1.) In the absence of judicial construction, legislative construction of constitutional provisions must control. (*People v. Home Ins. Co.*, 92 N. Y. 328; *People ex rel. v. Williams*, 55 N. Y. 357; *People v. Suprs. of Orange*, 17 N. Y. 235.) Every presumption is in favor of the constitutionality of a statute. (*Fort v.*

N. Y. Rep.]

Opinion *Per Curiam*

Cummings, 90 Hun, 481; *People v. Budd*, 117 N. Y. 13; *Roosevelt v. Goddard*, 32 Barb. 533; *People ex rel. v. Durston*, 119 N. Y. 569; *Sweet v. City of Syracuse*, 129 N. Y. 316; *People ex rel. v. Rice*, 135 N. Y. 484; *Matter of Church*, 28 Hun, 476; *People ex rel. v. Lorillard*, 135 N. Y. 285; *Smith v. People*, 47 N. Y. 330; *People ex rel. v. Potter*, 47 N. Y. 375; *People ex rel. v. Angle*, 109 N. Y. 564.)

Per Curiam. This action was to recover one thousand dollars which the plaintiffs had deposited with the defendant as earnest money to secure the performance by them of a bid or contract for the purchase of one hundred and fifteen bonds of the par value of one thousand dollars each, to be issued by it for the purpose of securing the money with which to construct a system of water works within its boundaries for the use of the defendant and its inhabitants. The bonds were advertised for sale, and each bidder was required to deposit a certified check for one thousand dollars. The check of the successful bidder was to be applied on account of the purchase price of the bonds, or to be retained by the defendant as liquidated damages in case the purchaser should fail to comply with his bid. The plaintiffs made a written bid for the purchase of the bonds, and delivered to the treasurer of the defendant a cashier's check for one thousand dollars, to be applied on the purchase price of the bonds if awarded to them. The bonds were thus awarded. They were tendered to the plaintiffs, but they refused to accept them, and notified the defendant that they elected to rescind their contract. They then made a demand upon the fiscal officer of the defendant for the amount thus deposited, which was refused, and this action was commenced.

The defendant demurred to the complaint upon the ground that it appears upon its face that it does not state facts sufficient to constitute a cause of action. The demurrer was sustained at Special Term and unanimously affirmed by the Appellate Division.

That the defendant was authorized by chapter 269 of the

Laws of 1898 to establish a system of water works and to issue bonds for that purpose is not denied. The contention of the plaintiffs is that that statute was unconstitutional and void, because it was in conflict with the provisions of section 1, article 2 of the Constitution of the state, which defines the general qualifications of the electors of the state as follows: "Every male citizen of the age of twenty-one years, who shall have been a citizen for ninety days, and an inhabitant of this State one year next preceding an election, and for the last four months a resident of the county, and for the last thirty days a resident of the election district in which he may offer his vote, shall be entitled to vote at such election in the election district of which he shall at the time be a resident, and not elsewhere, for all officers that now are or hereafter may be elective by the people; and upon all questions which may be submitted to the vote of the people."

The provisions of the statute of 1898, which the plaintiffs claim rendered it unconstitutional, are as follows: "A voter at a village election must possess the following qualifications: 1. To entitle him to vote for an officer, he must be qualified to vote at a town meeting of the town of Volney, and must have resided in the village thirty days next preceding such election. 2. To entitle him to vote upon a proposition, he must be entitled to vote for an officer, and he or his wife must also be the owner of property in the village, assessed upon the last preceding assessment roll thereof." The manifest purpose of these provisions was to define the qualifications of electors who should be authorized to vote at the various municipal elections of the defendant for the election of its public officers, and also to define the qualifications they must possess to vote upon the various propositions which should arise as to the business or financial affairs of the municipality. To vote for public officers, they were required to possess only the qualifications required of an elector of the town in which the defendant corporation was situated, which were only such as an elector was required to possess under the provisions of article two. But when a proposition was presented to be

voted upon which related only to the business or private affairs of the corporation and involved the creation of a debt or an extraordinary expenditure to be raised by taxation, then the added qualification of being a taxpayer was required.

The contention of the plaintiffs is that the provisions of chapter 269 contain a restriction upon the provisions of article two as to the right to vote for elective officers and upon all questions which may be submitted to the vote of the people, and, hence, are violative of its provisions. The obvious purpose of that article was to prescribe the general qualifications that voters throughout the state were required to possess to authorize them to vote for public officers or upon public questions relating to general governmental affairs. But we are of the opinion that that article was not intended to define the qualifications of voters upon questions relating to the financial interests or private affairs of the various cities or incorporated villages of the state, especially when, as in this case, it relates to borrowing money or contracting debts. This becomes manifest when we also consider section 1 of article 12 of the Constitution which provides: "It shall be the duty of the Legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments, and in contracting debt by such municipal corporations." Article two must be construed in connection with article twelve. When read together, we have two provisions of the Constitution which relate to this question. The first was intended merely to define the general qualifications of voters for elective officers or upon questions which may be submitted to the vote of the people which affect the public affairs of the state; the second, a provision by which it is made the duty of the legislature to protect the taxpayers of every city and village in the state and to restrict their power of taxation, assessment, borrowing money and contracting debts, so as to prevent any abuse thereby. One is general, relating to the whole state. The other is in effect local, relating only to the cities and villages

of the state. One relates only to the general governmental affairs of the state. The other relates to the business or private affairs of the municipalities specified. By the latter section the manner of restraining municipal corporations from contracting debts and of preventing abuses in that regard is left to the sound discretion of the legislature, and was to be controlled by such legislation as it should deem proper and which tended to secure that end. What better or more effective method of preventing such abuses and protecting such taxpayers could be devised than to restrict the right of voting upon propositions for borrowing money or for contracting debts, to the persons who are liable to be taxed for the payment of such debts? Indeed, the proposition that the incurring of such indebtedness shall be sustained only when a majority of the taxable inhabitants shall vote in its favor, seems not only to be pre-eminently just, but such has been the method which has hitherto been generally, if not universally, adopted by the legislature to restrain the various villages of the state in their power of borrowing money or contracting debts so as to prevent such abuses. Not until now, so far as we know, has it been even claimed that such a provision was violative of the article of the Constitution defining the general qualifications of the electors of the state. Indeed, the established policy of this state has been to limit the right of suffrage as to the business or financial affairs of its various villages to the taxpayers of the municipality, and it has never been its policy to confide their financial affairs to the general voters therein.

When we consider all the provisions of the Constitution bearing upon this subject, we feel assured that none of the changes or amendments of that instrument was intended to alter or affect the power of the legislature to restrict the right of villages to borrow money or contract debts for unusual or extraordinary expenditures to cases where a majority of the taxpaying electors should, by their votes, consent thereto. It was the obvious intention of its framers to provide that any abuses of that character should be prevented by the legisla-

N. Y. Rep.]

Statement of case.

ture, and article twelve so plainly declares. Such, we think, was the purpose and effect of the legislation under consideration, that it was fully justified and is not in conflict with the provisions of the organic law. Hence, we conclude that the proceedings of the defendant which resulted in issuing the bonds in question were justified by the statute, that it is valid and that the judgment herein should be affirmed.

The judgment and order should be affirmed, with costs.

PARKER, Ch. J., GRAY, BARTLETT, MARTIN, CULLEN and WERNER, JJ., concur; HAIGHT, J., absent.

Judgment and order affirmed.

THE JAMESTOWN BUSINESS COLLEGE ASSOCIATION, LIMITED,
Appellant, v. ELVA J. ALLEN, Respondent.

EVIDENCE — PAROL EVIDENCE INADMISSIBLE TO SHOW THAT NOTE, ABSOLUTELY DELIVERED AT DATE THEREOF, WAS NOT TO BE PAID UPON THE HAPPENING OF A SUBSEQUENT CONTINGENCY. A promissory note for a fixed sum, payable at a certain time and place, and actually delivered to the payee at the date thereof, although accompanied by a contract in writing showing that the note was given for a scholarship in a business college, the course of study to be entered upon by the maker of the note at or about the time the note became due, such scholarship to be transferable after payment therefor had been made and acknowledged, cannot be contradicted by parol evidence that the note was not to be paid if the maker should decide not to take instructions at the school and could not sell her scholarship, in which event the note was to be canceled and the maker released from the payment thereof, since the delivery of the note was not a conditional delivery, not to become complete and effective until the happening of some condition precedent, but was an absolute delivery, which cannot be defeated by the happening of any subsequent contingency.

Jamestown Business College Assn. v. Allen, 59 App. Div. 627, reversed.

(Argued May 29, 1902; decided October 21, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 1, 1901, affirming a judgment in favor of defendant entered upon a verdict and an order denying a motion for a new trial.

The action is upon a promissory note in the following form :

"\$90.00 JAMESTOWN, N. Y., *Aug.* 17, 1897.

"August 1, 1898, after date, I promise to pay to the order of Jamestown Business College Ass'n. Ltd., Ninety dollars at the Jamestown National Bank. Value received.

"ELVA J. ALLEN."

Contemporaneously with the execution and delivery of this note there was executed the following paper :

"SINGLE SCHOLARSHIP.

"JAMESTOWN BUSINESS COLLEGE ASSOCIATION, LIMITED.

"H. E. V. PORTER, *President.*

"No. ——— JAMESTOWN, N. Y., *Aug.* 17, 1897.

"\$90.00

"I, Elva J. Allen, of P. O. Box 186, Cattaraugus, N. Y., have this day purchased a Two years Scholarship in Business Shorthand and English Department of Jamestown Business College, Jamestown, N. Y., for the sum of \$ Ninety to be used by myself, who will enter upon the course of study about August 1, 1898, for which we, or either of us, promise to pay to the order of JAMESTOWN BUSINESS COLLEGE ASSOCIATION, LIMITED, \$ Ninety as follows :

"August 1, 1898.

"Name, ELVA J. ALLEN.

"Witness, JULIA BYRNE.

"Scholarship transferable upon the following conditions :

"1st. The above contract shall be paid in full and certified by the Treasurer.

"2nd. In case ————— has received instruction in his Scholarship it is understood and agreed that he shall pay for such time at the regular advertised rates of tuition, whereupon the party to whom this may have been transferred shall be entitled to instruction according to the terms of this agreement.

"H. E. V. PORTER,
"*President.*"

This paper was made out in duplicate. One copy was kept by the defendant and the other, signed by her, was delivered to the agent of the plaintiff. When the note became due it was not paid. The complaint is in the usual form in actions upon promissory notes. The answer admits the making of the note, alleges want of consideration, and sets up an agreement by the terms of which the defendant was to be released from the payment of said note if she did not take any instructions at plaintiff's school. Further facts appear in the opinion.

Alfred L. Furlow for appellant. The attempt on the part of the defendant to vary and contradict the terms of a written instrument by parol evidence was squarely incompetent. (*Gridley v. Dole*, 4 N. Y. 486; *Crater v. Bininger*, 45 N. Y. 545; *Irwin v. Saunders*, 1 Cow. 249; *Fitzhugh v. Runyan*, 8 Johns. 375; *Wills v. Baldwin*, 18 Johns. 45; *Frost v. Everett*, 5 Cow. 497; *Eaves v. Henderson*, 17 Wend. 190; *Lewis v. Jones*, 7 Bosw. 366; *Burhans v. Carter*, 13 Hun, 153; *Willse v. Whitaker*, 22 Hun, 242.)

George J. Dikeman for respondent. The note in question was delivered by the defendant to plaintiff's agent upon the express condition that; if the defendant did not attend the school of the plaintiff or could not sell the scholarship, the plaintiff would surrender the note and defendant would not be liable thereupon. (*Benton v. Martin*, 52 N. Y. 570; *Juilliard v. Chaffee*, 92 N. Y. 529; *Bookstaver v. Jayne*, 60 N. Y. 146; *G. N. Bank v. Colwell*, 57 Hun, 169; *Reynolds v. Robinson*, 110 N. Y. 654; *Persons v. Hawkins*, 41 App. Div. 171; *Higgins v. Ridgway*, 153 N. Y. 130.) There was an utter lack of consideration for the note in suit. (*McCrea v. Purmort*, 16 Wend. 460; *Wheeler v. Billings*, 38 N. Y. 263; *Arnot v. E. R. R. Co.*, 67 N. Y. 315; *Wells v. Wells*, 8 App. Div. 422; *Peck v. Burwell*, 48 Hun, 471; *Sawyer v. Chambers*, 43 Barb. 622.)

WERNER, J. Under the unanimous affirmance by the Appellate Division of the judgment entered upon the verdict of the jury herein, the only question presented by this record that survives to reach this court is the single exception taken by the plaintiff to the admission of parol evidence, given by the defendant, in contradiction of the written instrument upon which the action is founded. I think that the exception referred to was well taken. The action is upon a promissory note. The complaint is in the usual form in such actions. The answer alleges want of consideration and an agreement that the note was not to be paid if the defendant did not take the course of instruction at plaintiff's school, for which the note was given. Upon the trial, under these pleadings, the plaintiff introduced the note in evidence and rested its case. Thereupon the defendant, under the direction of the court, assumed the affirmative of the issue and introduced evidence in support of the allegations of her answer. Despite plaintiff's objection to any oral testimony tending to vary or contradict the written instrument, the defendant was permitted to testify that the note in suit was not to be paid if she should decide not to attend plaintiff's school and could not sell her scholarship. I think this ruling of the trial court was erroneous, and that the exception thereto requires a reversal of this judgment.

The general rule, that evidence of what was said between the parties to a valid instrument in writing, either prior to or at the time of its execution, cannot be received to contradict or vary its terms, applies to promissory notes and bills of exchange. (*Thompson v. Ketcham*, 8 Johns. 190; *Norton v. Coons*, 6 N. Y. 33; *Read v. Bank of Attica*, 124 N. Y. 671.)

As stated in *Thomas v. Scutt* (127 N. Y. 133) and *Stowell v. Greenwich Ins. Co.* (163 N. Y. 305), there are two classes of exceptions to this general rule of evidence. The first class includes those cases in which parol evidence is received to show that a written instrument which purports to be a contract is in fact no contract at all. The other class "embraces

N. Y. Rep.] Opinion of the Court, per WERNER, J.

those cases which recognize the instrument as existing and valid, but regard it as incomplete, either obviously or at least possibly, and admit parol evidence, not to contradict or vary, but to complete the entire agreement of which the writing was only a part. Receipts, bills of parcels and writings that evidently express only some parts of the agreement are examples of this class which leaves the written contract unchanged, but treats it as part of an entire oral agreement, the remainder of which was not reduced to writing. Two things, however, are essential to bring a case within this class: 1. The writing must not appear upon inspection to be a complete contract, embracing all the particulars necessary to make a perfect agreement and designed to express the whole arrangement between the parties, for in such a case it is conclusively presumed to embrace the entire contract. 2. The parol evidence must be consistent with and not contradictory of the written instrument."

I think the case at bar does not fall within either of these exceptions. In form, the instrument sued upon is a complete contract. This is equally true as regards the note alone, or the note and the certificate of scholarship together considered as parts of the same contract. If it is a contract at all, it is a complete contract. The oral evidence received over plaintiff's objection did not serve to amplify or complete the writing; it was radically contradictory thereof. The mere statement of this fact is the only argument necessary to show that the case is not in the class of cases in which oral testimony is received to complete contracts which are only partly reduced to writing. Does the oral testimony received over plaintiff's objection tend to show that the written instrument, which was a complete contract in form, was in fact no contract? This question suggests the distinction between this case and the cases upon which the defendant relies. According to the testimony of the defendant the delivery of the note in suit was not conditional upon the happening of some event before it was to become a binding obligation; on the contrary, it is said to have been complete and unconditional. The

defendant says, in substance, that the note became effective at once and was to be binding upon her unless she should decide not to take instructions at plaintiff's school and could not sell her scholarship, in which event it was to be canceled and she was not to be called upon to pay it. Had the parties agreed that the note should not be regarded as completely delivered until the defendant should take such instructions, or until she could sell her scholarship, it would not have become operative until either of these events had transpired. The agreement which the parties did make was just the reverse of that. The note is stated to have been actually and unconditionally delivered, and was to be and remain a note until the defendant should decide either to sell the scholarship, if that were possible, or to abandon the projected course of instruction. As the note was not payable until a year after its date, and the course of instruction was not to begin until the note became due, the defendant's claim is, in reality, an assertion that the note was to be regarded as a valid and binding obligation until it became due, when it was to be optional with the defendant to decide whether it should then be payable or not. This was not a conditional delivery which held the consummation of the contract in abeyance, but an absolute delivery which, as the defendant supposed, could be annulled in a certain contingency at her option. It is obvious, therefore, that there is a radical distinction between a conditional delivery, which is not to become complete and effective until the happening of some condition precedent, and a complete delivery, like the one at bar, which is sought to be defeated by subsequent contingencies that may or may not arise. In the one case there is no contract until the condition has been complied with; in the other there is a binding contract, notwithstanding the happening of the contingency relied upon to defeat it. For the foregoing reasons the cases of *Seymour v. Cowing* (1 Keyes, 532); *Reynolds v. Robinson* (110 N. Y. 654); *Blewitt v. Boorum* (142 N. Y. 357); *Higgins v. Ridgway* (153 N. Y. 130), and kindred cases, holding that conditions limiting and circumscribing the delivery of written

N. Y. Rep.] Dissenting opinion per HAIGHT, J.

instruments may be shown by parol, are not applicable to the case at bar.

This case seems to fall directly within the principle "that parol evidence of an oral agreement made at the time of the drawing, making or indorsing of a bill or note, cannot be permitted to vary, qualify or contradict, to add or to subtract from the absolute terms of the written contract." (*Specht v. Howard*, 16 Wall. 564; *Forsyth v. Kimball*, 91 U. S. 291; *Brown v. Wiley*, 61 U. S. 442; *Brown v. Spafford*, 95 U. S. 474; *Read v. Bank of Attica*, 124 N. Y. 671.)

For these reasons I think the parol evidence above referred to was erroneously admitted, and, therefore, the judgment herein should be reversed and a new trial ordered, with costs to abide the event.

HAIGHT, J. (dissenting). This action was upon a promissory note, as follows:

"\$90.00

JAMESTOWN, N. Y., Aug. 17, 1897.

"August 1, 1898, after date, I promise to pay to the order of The Jamestown Business College Ass'n., L't'd, Ninety Dollars, at the Jamestown National Bank. Value received.

"ELVA J. ALLEN."

The answer admitted the making of the note, but alleged that it was without consideration, and that it was delivered to the plaintiff upon the express condition that in case the defendant did not attend its college the note was to be surrendered up by the plaintiff and canceled and that nothing should become due thereon.

The plaintiff is a domestic corporation managing a business college located in Jamestown, N. Y. The defendant, at the time the note in question was executed, was a young lady just past twenty-one years of age, and resided with her parents on a farm near the village of Cattaraugus. This note was given for what was denominated a "single scholarship" in the plaintiff's college, and was as follows:

"SINGLE SCHOLARSHIP.

"JAMESTOWN BUSINESS COLLEGE ASSOCIATION, LIMITED.

"H. E. V. PORTER, *President*.

"No. —

JAMESTOWN, N. Y., Aug. 17, 1897.

"\$90.00

"I, Elva Allen of P. O. Box 186, Cattaraugus, N. Y., have this day purchased a two year's scholarship in business, shorthand and English department of Jamestown Business College, Jamestown, N. Y., for the sum of \$Ninety, to be used by myself, who will enter upon the course of study about August 1, 1898, for which we, or either of us, promise to pay to the order of JAMESTOWN BUSINESS COLLEGE ASSOCIATION, LIMITED, \$Ninety as follows:

"August 1, 1898.

"Name, ELVA J. ALLEN.

"Witness, JULIA BYRNE.

"Scholarship transferable upon the following conditions: 1st. The above contract shall be paid in full and certified by the treasurer. 2nd. In case ————— has received instruction in his scholarship it is understood and agreed that he shall pay for such time at the regular advertised rates of tuition, whereupon the party to whom this may have been transferred shall be entitled to instruction according to the terms of this agreement.

"H. E. V. PORTER,

"President."

The proof disclosed that Miss Byrne, the plaintiff's agent, at the time the note was given, represented to the defendant that she had met the defendant's father; that he was anxious for her to attend a business college, and had asked her to see the defendant as he would like her to attend the plaintiff's school. It also disclosed that he made no such statement, but, on the contrary, informed such agent that his girls could not attend that institution, having already taken schools at home to teach, and that his wife's health was so poor that he could not spare them to go away. The defendant also proved that

before the note was given and the paper designated as "Single Scholarship" was delivered, it was agreed between the plaintiff's agent and the defendant that if the latter did not attend the school nor sell the scholarship, it might be returned and the note would be surrendered to the defendant who would not have to pay it unless she could attend the school or sell the scholarship. The defendant testified that one thing which induced her to enter into the arrangement with the plaintiff was the statement that her father was anxious for her to attend its school and had asked the agent to see her about it. The plaintiff's agent stated to the defendant that the price for such a scholarship was one hundred and fifty dollars, but she would furnish her one at ninety dollars, and the defendant was induced to make and deliver the note in suit by that representation coupled with the representations that her father wanted her to attend such school and that if she did not go or sell the scholarship the note would be returned. The proof justified the jury in finding that the delivery of the note in suit was made upon the express condition that if the defendant did not attend the school or sell the scholarship, the note should be returned. It also appeared that when the defendant asked the plaintiff's agent if the paper in suit was a note, she in substance said, Well, it shows how much you get your scholarships for and that you will not have to pay the one hundred and fifty dollars. It was before the note was signed that the plaintiff's agent told her that if she did not attend the school or sell the scholarship the note would be surrendered. There was also proof to the effect that the defendant made an attempt to sell the scholarship, was unable to do so, did not attend the school, and that she offered to return the scholarship and demanded her note, which the plaintiff refused to surrender.

Upon the issue presented by the defendant's answer there was a conflict in the evidence, and the court submitted it to the jury in a charge to which no exception was taken. The jury found for the defendant, and upon appeal to the Appellate Division the judgment entered upon the verdict was

unanimously affirmed. The unanimous affirmance forecloses this court from an examination of the question whether the evidence was sufficient to justify the verdict, and the only questions that can be examined are those which relate to the reception or rejection of evidence. The defendant introduced evidence to show that the note was delivered upon the conditions and under the circumstances alleged in her answer and proved by her on the trial. If the note was without consideration, or if it was delivered upon the condition that it was to be payable only in the event of the defendant's attending the plaintiff's college or selling the scholarship, we think it would constitute a defense to this action, and evidence to prove those facts was admissible. The only consideration for the note claimed, by the plaintiff was the delivery to the defendant of the scholarship mentioned. An examination of that paper shows that there was no express agreement by the plaintiff to furnish the defendant with any instruction whatever. It contained, *first*, a statement by the defendant that she had purchased a two years' scholarship to be used by herself, and that she would enter upon the course of study about August, 1898, for which she promised to pay ninety dollars. That contract was signed only by the defendant and a subscribing witness. Then followed the conditions upon which the scholarship might be transferred. That was signed by the plaintiff. But we find nowhere in that paper any express promise by the plaintiff to furnish the instruction mentioned in the certificate. Although in the portion of the contract relating to a transfer it is provided that the transferee should be entitled to instruction according to the terms of this agreement if the conditions therein were complied with, yet, when the agreement referred to is examined no terms requiring the plaintiff to give the defendant instruction are found. As the only consideration which the plaintiff pretends there was for the defendant's note was this agreement, it is difficult to see how such an agreement, which contained no promise to furnish the defendant instruction, could be a consideration for the note in suit. While it is true that mutual promises may form

a consideration, each for the other, still, to form a consideration, promises must be mutual and not merely unilateral. This action was brought by the payee of the note, so that no question as to a *bona fide* holder is involved. Hence the fact that there was no consideration for it was a defense to this action. It is true that if the defendant had received the instruction mentioned, she would have been liable upon the ground that that was a sufficient consideration, still, not having received any instruction and there being no promise on the part of the plaintiff to furnish it, there was no consideration for the note. (*Sawyer v. Chambers*, 43 Barb. 622; *Miller v. McKenzie*, 95 N. Y. 575; *Peck v. Burwell*, 48 Hun, 471; *Bookstaver v. Jayne*, 60 N. Y. 146; *Keuka College v. Ray*, 167 N. Y. 96, 101.)

If the defendant's note had been paid, it may be that the law would have implied a promise by the plaintiff to furnish instruction to the defendant, but that alone was insufficient to furnish consideration for the note. An express promise on one side and only an implied promise upon the other, do not present a case of mutual promises where one is a consideration for the other. "Where the promise of one party is the consideration of the promise of the other, the promises must be concurrent and obligatory on both parties at the same time." (*Tucker v. Woods*, 12 Johns. 190; *Keep and Hale v. Goodrich*, Id. 397; *De Beerski v. Paige*, 47 Barb. 172; affirmed, 36 N. Y. 537. See, also, 1 Parsons on Contracts and note [5th ed.], p. 448, citing *Lees v. Whitcomb*, 2 Mo. & P. 86; *S. C.*, 5 Bing. 34; *Sykes v. Dixon*, 9 A. & E. 693; *S. C.*, 1 Per. & D. 463.)

The only remaining question is whether the defendant was properly permitted to prove that the note in question was delivered to the plaintiff's agent upon the express condition that if the defendant did not attend the plaintiff's school or sell the scholarship the plaintiff would surrender the note and the defendant would not be liable thereon. We think it was competent for her to show the terms upon which the note was delivered, to restrict and limit her liability thereby, and

to protect herself against liability, unless she actually received the instruction, which was the only contemplated consideration for her note.

"Instruments not under seal may be delivered to the one to whom upon their face they are made payable, * * * upon conditions, the observance of which is essential to their validity. And the annexing of such conditions to the delivery is not an oral contradiction of the written obligation, though negotiable as between the parties to it, or others having notice. It needs a delivery to make the obligation operative at all, and the effect of the delivery and the extent of the operation of the instrument may be limited by the conditions with which delivery is made. And so, also, as between the original parties and others having notice, the want of consideration may be shown." (*Benton v. Martin*, 52 N. Y. 570, 574; *Bookstaver v. Jayne*, 60 N. Y. 146; *Juilliard v. Chaffee*, 92 N. Y. 529, 534; *Garfield Nat. Bk. v. Colwell*, 57 Hun, 169; *Seymour v. Cowing*, 1 Keyes, 532; *Reynolds v. Robinson*, 110 N. Y. 654; *Baird v. Baird*, 145 N. Y. 659, 664; *Blewitt v. Boorum*, 142 N. Y. 357; *Schmittler v. Simon*, 114 N. Y. 176; *Higgins v. Ridgway*, 153 N. Y. 130.)

In *Juilliard v. Chaffee* the rule which excludes parol evidence when offered to contradict or vary the legal import of a written instrument was considered, and it was said that that rule "is not to be questioned or disturbed. In this state it has been thought to be so well settled in reason, policy and authority as not to be a proper subject of discussion. It has full application, however, within very narrow limits. In the first place it applies only in controversies between parties to the instrument (*Overseers, etc., of New Berlin v. Overseers, etc., of Norwich*, 10 Johns. 229), and between them is subject to exceptions, upon allegations of fraud, mistake, surprise, or part performance of the verbal agreement. Nor does it deny the party in whose favor that agreement was made the right of proving its existence by way of defense in an action upon the written instrument, under circumstances which would make the use of it for any purpose inconsis-

N. Y. Rep.] Dissenting opinion, per HAIGHT, J.

tent with that agreement, dishonest, or fraudulent. * * *

A party, sued by his promisee, is always permitted to show a want or failure of consideration for the promise relied upon, and so he may prove by parol that the instrument itself was delivered even to the payee to take effect only on the happening of some future event * * * or that its design and object were different from what its language, if alone considered, would indicate." *Seymour v. Cowing* is to the effect that instruments not under seal may be delivered to the party to whom, upon their face, they are made payable, or who, by their terms, is entitled to some interest or benefit under them, upon a condition, the performance of which is necessary in order to perfect the title of the holder to enforce the contract. In *Reynolds v. Robinson* it was held that parol evidence is admissible to show that a writing, which is, in form, a complete contract, of which there has been a manual tradition, was not to become a binding contract until the performance of some condition precedent resting in parol. In *Baird v. Baird* (p. 663) the court said: "The rule which excludes evidence of parol negotiations or conditions, when offered to contradict or substantially vary the legal import of a written agreement, does not prevent a party to the agreement, in an action between the parties, from showing, by way of defense, the existence of a contemporaneous oral agreement, made at the time the writing was executed and delivered, which would render the use of the written instrument, for any purpose contrary to or inconsistent with the oral stipulation, dishonest or fraudulent. * * *

The consideration of a written instrument is always open to inquiry, and a party may show that the design and object of the agreement was different from what the language, if alone considered, would indicate. * * *

Parol evidence may also be given to show that a writing, purporting to be a contract or obligation, was not in fact intended or delivered as such by the parties." In *Blewitt v. Boorum* it was held that even in an action upon a contract under seal, which did not require a seal for its validity, it is competent for the defendant to show that the instrument was executed

upon condition that it was not to operate until the performance of some prescribed act, and that that may be shown by oral evidence. In *Schmittler v. Simon* the defendant offered to show that when the draft in suit was drawn, it was understood between the drawer and payee and the plaintiff that it was to be paid out of the drawer's interest in his mother's estate. The defendant then stated in their presence that he would not accept or become personally liable, and it was agreed that he should accept in his capacity as executor, to be paid out of the drawer's interest in the estate. This evidence was objected to and excluded. Held, error; that the testimony was competent as bearing upon the understanding of the relation and character of the liability of the defendant assumed by his acceptance. In *Higgins v. Ridgway* we held that as between the original parties to a promissory note, a conditional delivery, as well as want of consideration, may be shown, and that parol evidence that the delivery was conditional and of the terms of the condition is not open to the objection of varying or contradicting the written contract.

When we test the rulings of the trial court in admitting parol evidence to show the want of consideration and that the note in suit was delivered to the plaintiff upon the express agreement that if the defendant did not attend the plaintiff's school or sell the scholarship, the plaintiff would surrender the note, and the defendant would not be liable thereon, it is manifest that these rulings were correct and constituted no error for which this judgment can be properly reversed. As those are the only questions which this court has jurisdiction to determine, it follows that the judgment appealed from should be affirmed, with costs.

PARKER, Ch. J., GRAY, VANN and CULLEN, JJ., concur with WERNER, J.; HAIGHT, J., dissents; MARTIN, J., not sitting.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. PHEBE A. WADDY, Respondent, v. JOHN N. PARTRIDGE, as Police Commissioner of the City of New York, Appellant.

MANDAMUS—BROOKLYN (CITY OF)—PENSIONS TO WIDOWS OF MEMBERS OF THE POLICE DEPARTMENT—L. 1888, CH. 588. The provision of the charter of the city of Brooklyn (L. 1888, ch. 588, tit. 11, § 42) authorizing the granting of a pension to the widow of any member of the police force or attache of the police department who shall have died after ten years of service in the police department of that city and providing that the commissioner of police may in his discretion revoke any pension granted or any part thereof, "except to members of the police force and attaches retired after twenty years' service," does not authorize the granting of a pension to the widow of a policeman who had been retired upon a pension after twenty years' service and who had died several years before the enactment of the statute, since such policeman was not a member of the police department at the time of his death and the statute is not retroactive; if the statute could be construed to cover such case, it would be unconstitutional as an appropriation of public moneys to purely private purposes. The widow of such policeman, therefore, is not entitled to a mandamus requiring the police commissioner of the city of New York to revoke his revocation of a pension previously granted to her under the statute.

People ex rel. Waddy v. Partridge, 74 App. Div. 620, reversed.

(Argued October 7, 1902; decided November 11, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 23, 1902, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus requiring the defendant to pay to the relator a pension from the police pension fund of the city of New York.

The facts, so far as material, are stated in the opinion.

George L. Rives, Corporation Counsel (*James McKeen* of counsel), for appellant. Upon his retirement in 1882 the relator's husband, George A. Waddy, ceased to be a member of the police department. (L. 1873, ch. 863, tit. 11, § 4.) Assuming that power did exist at the time this pension was granted to grant the same, it was an act exercised by the com-

missioner in his discretion, and its discontinuance was a matter in the discretion of the present commissioner of police as the successor of the Brooklyn commissioner of police and excise. (L. 1873, ch. 863, § 41; *Matter of Tobin*, 53 App. Div. 453; 164 N. Y. 532; *People ex rel. v. Martin*, 131 N. Y. 196.)

Charles K. Terry for respondent. The grant of a pension to relator was legal. (*Blashko v. Wurster*, 156 N. Y. 437; *People ex rel. v. Bd. of Suprs.*, 51 N. Y. 401; *Hagadorn v. Raux*, 72 N. Y. 583; *Smith v. Floyd*, 140 N. Y. 337.) The husband of the relator at the time of his death was a member of the police force of the city of Brooklyn. (*McGowan v. Bd. of Police*, City Court of Brooklyn, Aug. 9, 1882.) The defendant had not the power to revoke relator's pension. (L. 1901, ch. 466, § 356; L. 1888, ch. 583, § 41; *Matter of Tobin*, 164 N. Y. 532.) Under the present charter of the city of New York the payment of relator's pension is made mandatory. (L. 1901, ch. 466, § 356; *People ex rel. v. Suprs. of Otsego Co.*, 51 N. Y. 401; *Hagadorn v. Raux*, 72 N. Y. 583; *Smith v. Floyd*, 140 N. Y. 337; *People ex rel. v. Common Council*, 78 N. Y. 61; *Matter of Tobin*, 64 App. Div. 377; *Mayor v. Furze*, 3 Hill, 612; *Matter of Armstrong v. Murphy*, 65 App. Div. 123; *People ex rel. v. Martin*, 32 N. Y. S. R. 440; *Sargent v. Bennett*, 3 How. Pr. 515; *People ex rel. v. Martin*, 145 N. Y. 260.) The relator's deceased husband having contributed to this fund the relator is entitled to the benefit from said fund. (*Sargent v. Bennett*, 3 How. [U. S.] 515; *People ex rel. v. Suprs.*, 51 N. Y. 401; *Hagadorn v. Raux*, 72 N. Y. 586; *Smith v. Floyd*, 140 N. Y. 337; *Matter of Tobin*, 164 N. Y. 534; 53 App. Div. 453.) Mandamus is the proper remedy. (*People ex rel. v. Suprs.*, 11 N. Y. 574; *People ex rel. v. Common Council*, 78 N. Y. 61; *Howell v. Mills*, 53 N. Y. 322.)

O'BRIEN, J. The courts below have awarded a peremptory writ of mandamus against the defendant as police commis-

sioner, requiring him to revoke his revocation of a pension to the relator as the widow of a member of the police force of Brooklyn. The questions whether the commissioner can be required to revoke his action and the right of the relator to the pension under the statute are involved in the inquiry.

The relator's husband was a member of the old Metropolitan police force of Brooklyn, having been originally appointed January 8th, 1851. On April 1st, 1882, after more than twenty years' service, he was retired upon a pension pursuant to section forty-one of the then existing charter of Brooklyn (Chapter 863, Laws of 1873). At that time there was no law in existence providing for a pension to a widow of any member of the police force. By chapter 583 of the Laws of 1888 the local laws affecting the public interests in Brooklyn were revised and combined in a single act which came to be known as the charter of that city, and this statute contained the following provision in regard to pensions. The commissioner of police was authorized to grant pensions in the following cases: "To the widow of any member of the police force or attache of the police department who shall have been killed while in the actual performance of police duty, or shall have died from the effects of any injury received whilst in the actual discharge of such duty, or who has died or shall hereafter die, after ten years of service in the police department of the city of Brooklyn, provided such death shall not have been caused by misconduct on his part, a sum not to exceed three hundred dollars per annum." By another section of the statute it was provided that "the pensions to widows shall terminate when the widow shall remarry. * * * The commissioner of police may in his discretion order any pensions granted, or any part thereof, to cease except to members of the police force and attaches retired after twenty years' service." The relator's husband died on June 7th, 1882, several years prior to the enactment of any law providing for pensions to widows. More than seven years after his death, on August 16th, 1889, the relator applied for a pension, which was granted to her and paid until discontinued by the defendant.

The contention of the defendant is that the relator's husband had ceased to be a member of the police force long before his death, and that there was no power under this statute to grant a pension to a widow of one who was not at the time of his death a member of the police force.

We think that the provisions of the charter authorizing the granting of a pension to the widow of a member of the police force had no application to the relator. The relator's husband died some six years prior to the enactment of any law for the pensioning of widows. He was not in any proper sense a member of the police force at the time of his death, and the statute, we think, was not retroactive. It was not intended to apply to cases where members of the police force, who had been retired from the service, died prior to the enactment of the statute. If it was applicable to the relator it could be applied to every widow of a member of the police force who had ever served ten years, no matter at what time, however remote, prior to the enactment of the statute, he died.

If, however, the provision of the charter referred to can be so construed as to cover the relator's case, it would be plainly unconstitutional as an appropriation of public moneys to purely private purposes. (*Matter of Mahon v. Board of Education*, 171 N. Y. 263.)

We think that the writ of mandamus was improperly granted in this case, and, therefore, the order appealed from should be reversed and the application denied, without costs.

PARKER, Ch. J., BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ., concur.

Ordered accordingly.

In the Matter of WILLIAM H. DOUGLAS, Appellant, v. THE BOARD OF SUPERVISORS OF THE COUNTY OF WESTCHESTER, Respondent.

TAX — ILLEGAL ASSESSMENT IN WESTCHESTER COUNTY — LAND CANNOT BE REASSESSED WITHOUT NOTICE. An assessment of real estate located in Westchester county, which has been declared illegal by the Supreme Court and ordered stricken from the roll because the name of the non-resident owner had been placed in the first column of the roll among the names of residents, is not an unpaid tax within the meaning of section 3 of chapter 610 of the Laws of 1874, as amended by chapter 198 of the Laws of 1877, authorizing the town board to "examine the account of unpaid taxes" returned to the supervisor by the collector, and, after adding certain percentages, to "reject all taxes on land so imperfectly described or so erroneously assessed that the collection thereof cannot be legally enforced," and authorizing a reassessment by the board of supervisors at their next annual meeting, since the assessment, having been stricken from the roll by a decree of the court, there was no "unpaid tax" to be returned by the collector or presented by the supervisor to the board, and under such circumstances a so-called reassessment must be regarded as a new and original assessment which cannot be properly made without notice to the landowner.

Matter of Douglas v. Bd. of Supervisors, 68 App. Div. 296, reversed.

(Argued October 6, 1902; decided November 11, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered January 29, 1902, which affirmed an order of the Westchester County Court denying a motion for an order directing the refund to the petitioner of a tax alleged to have been illegally assessed upon his property.

This was a proceeding to compel the board of supervisors of Westchester county to refund a tax alleged to have been illegally assessed upon certain property of the appellant. He applied to the County Court for the usual order under the County Law and in his affidavit set forth the following facts, none of which were denied by the respondent. The appellant is a resident of the city of New York, but owns thirty-one acres of land situate in the town of Mount Pleasant,

county of Westchester. In 1898 the assessors fixed the valuation of this land at the sum of \$38,250, but placed the name of the owner in the first column of the roll among the names of residents, thus attempting to make the tax a personal charge against him. At the proper time he appeared before the assessors and insisted that the assessment was illegal as well as excessive, but they refused to vacate or reduce the same. Subsequently, upon his application, a writ of certiorari was issued, and after a hearing said assessment was adjudged illegal and it was ordered that the same should be struck from the assessment roll. In August, 1899, the assessors undertook to reassess the same tax, but upon the appellant's application they struck the reassessment from the roll. On the 13th of February, 1900, the board of supervisors attempted to reassess said lands for the unpaid taxes of 1898, including a penalty of \$32.79, but no notice was given to the owner and no opportunity was afforded him to be heard. He refused to pay the tax until said real estate was advertised for sale at public auction, when he made the payment, after filing a written protest stating that it was under compulsion and in order to prevent a sale of his property. Subsequently he applied to the board of supervisors to have the amount of the taxes thus paid refunded to him, but the board refused to grant him any relief. Thereupon he applied to the County Court of Westchester county upon an affidavit setting forth the foregoing facts, among others, for an order compelling the board to refund the amount of said payment, but his motion was denied, without costs. He appealed to the Appellate Division, where the order denying his application was unanimously affirmed, and he then came here.

Andrew J. Shipman and Clarence S. Davison for appellant. Taxation for public purposes is a conceded power of government, but it must be enforced strictly according to law, or it becomes the most obnoxious means of confiscation. (*Hubbell v. Welden*, Hill & Denio Supp. 139; *Allen v. Com. of Land Office*, 38 N. Y. 312; *People ex rel. v. Goff*, 52 N.

N. Y. Rep.]

Points of counsel.

Y. 434; *Whitney v. Thomas*, 23 N. Y. 281; *Stebbins v. Kay*, 123 N. Y. 31; *Nat. Bank v. City of Elmira*, 53 N. Y. 49.) The tax of 1898 was illegally and improperly assessed and should be refunded. (*Adams v. Bd. of Suprs.*, 154 N. Y. 619; *Boyd v. Boyd*, 53 App. Div. 152; *Moore v. City of Albany*, 98 N. Y. 396; *Whitney v. Thomas*, 23 N. Y. 281; *Stebbins v. Kay*, 123 N. Y. 31; *Nat. Bank v. Elmira*, 53 N. Y. 49; *People ex rel. Oswald v. Goff*, 52 N. Y. 434; *Matter of N. Y. C. R. R. Co.*, 90 N. Y. 342; *Prosser v. Secor*, 5 Barb. 608; *Weaver v. Devendorf*, 3 Den. 117.) The board of supervisors did not comply with the requirements of any law in making this attempted reassessment, and the tax thereby levied is void and illegal. (L. 1896, ch. 908, § 54.) The appellant having paid this tax under protest and compulsion, and having applied to the board of supervisors to refund said tax, which they refused to do, is entitled to an order directing said board to refund the same. (*Matter of Adams*, 154 N. Y. 619; *Matter of Reid*, 52 App. Div. 243; *Bruecher v. Port Chester*, 101 N. Y. 240; *Vaughn v. Port Chester*, 135 N. Y. 460; *Poth v. Mayor, etc.*, 151 N. Y. 17; *Dale v. City of New York*, 71 App. Div. 227; *Matter of Gilloren*, 16 Misc. Rep. 130; *Matter of B. G. Co.*, 144 N. Y. 228; *Matter of McCue*, 45 App. Div. 406.)

J. Addison Young for respondent. The application in question was addressed to the discretion of the court, and the order appealed from is not reviewable in this court in the absence of a certificate of the court below. (*Merriam v. W. & P. L. Co.*, 155 N. Y. 140; *Adams v. Bd. of Suprs.*, 154 N. Y. 627.) This court has no power to compel the refunding to petitioner which is sought by this proceeding. (*Harris v. Bd. of Suprs.*, 16 Abb. [N. C.] 282; *Matter of Adams v. Bd. of Suprs.*, 154 N. Y. 619; *Matter of B. M. G. L. Co.*, 144 N. Y. 232; *Matter of Hermance*, 71 N. Y. 481; *Matter of N. Y. C. Protectory*, 77 N. Y. 342; *Matter of Peek*, 80 Hun, 122; *Matter of Baumgarten*, 39 App. Div. 174; *Matter of Young*, 26 Misc. Rep. 186.)

VANN, J. While the land of the appellant is subject to taxation and should bear its proper proportion of the public burden, unless the reassessment was made in accordance with law, payment of the tax was wrongfully exacted, and the amount thereof should be refunded as required by the County Law (L. 1892, ch. 686, § 16). "The power to levy assessments exists only where it is distinctly conferred by legislative authority." (*Stebbins v. Kay*, 123 N. Y. 31, 35.) The authority relied upon to sustain the reassessment under consideration is an act which applies only to the county of Westchester, passed in 1874 and amended in 1877. (L. 1874, ch. 610; L. 1877, ch. 193.) The third section of this act authorizes the town board to "examine the account of unpaid taxes" returned to the supervisor by the collector, and, after adding certain percentages, to "reject all taxes on land so imperfectly described or so erroneously assessed that the collection thereof cannot be legally enforced, and" to "file a transcript thereof in the town clerk's office." The record before us shows that the lands of the appellant were not imperfectly described, although the resolution to reassess recites that as the only ground upon which the reassessment was made. Said section further provides that a copy of said transcript "duly certified by the town clerk, shall be presented by the supervisor of the town to the board of supervisors at their next annual meeting, and said board shall reassess and charge the lands of persons intended to have been assessed for the said rejected taxes with the amount of such tax and percentage thereon, and shall direct the collection thereof with the other taxes of the year in the same manner as such taxes are directed to be collected * * *."

Assuming, but not deciding, that all the preliminaries expressly required by this statute were properly complied with, two questions arise for decision, *first*, whether the assessment of 1898 was an unpaid tax within the meaning of the statute; *second*, whether there could be a valid reassessment without notice of any kind to the landowner.

By a decree of the Supreme Court the assessment of 1898

N. Y. Rep.]

Opinion of the Court, per VANN, J.

was not only adjudged illegal, but it was further ordered "that said illegal assessment be and the same is hereby stricken from said assessment roll for the said town of Mount Pleasant for the year 1898." The assessment was illegal and invalid because it attempted to create a debt against the owner without jurisdiction. (*People ex rel. Barnard v. Wemple*, 117 N. Y. 77.) After the entry of said decree no assessment against the property in question remained upon the roll for that year, because, by the command of a court of competent jurisdiction, it had been stricken therefrom. Thenceforth in the eye of the law the roll was blank so far as the appellant and his property were concerned, the same as if his name had never been written thereon or a description of his property entered therein. The decree of the Supreme Court wiped out as with a sponge every letter and figure relating to the assessment in question, and thenceforward there was no "unpaid tax" to be returned by the collector or presented by the supervisor to the board. No reassessment as such was possible, because no assessment had been made and there was nothing for the supervisors to act upon. They had nothing before them which the law recognizes as having any substance or existence, and they had no jurisdiction to make a reassessment any more than if no attempt had ever been made to place the property upon the roll. When the court adjudged in effect that there was no assessment against the appellant's property upon the roll, no foundation was left upon which the supervisors could build, and their attempt in that regard had no legal effect as a reassessment. Whatever they did was a new assessment rather than a reassessment and required the same notice as an original assessment.

It expressly appears, however, that no notice of the proposed reassessment was given to the appellant and that no opportunity was given him to be heard in relation thereto. The statute in question contains no express provision for notice to the owner in case a reassessment is proposed, and in this respect it differs from the Tax Law, which provides for a notice of five days before the board of supervisors can make

a "reassessment of property illegally assessed." (L. 1896, ch. 908, § 54.) It is unnecessary to now decide whether reasonable notice, if actually given, would have been sufficient, even if the statute contains no express provision to that effect, for in this case no notice whatever was given or attempted, either personally, by mail or by advertisement. No grievance day was provided either by the statute or by the board of supervisors. The resolution of reassessment, adopted February 13th, 1900, directed that "said unpaid taxes and interest be levied and assessed upon and collected from said respective lands and premises in the same manner as and together with the taxes of and for the year 1899," yet the grievance day of that year was the third Monday of August, which had passed by more than six months before the board of supervisors took the action complained of. The appellant, therefore, had no opportunity to be heard before the tax was finally imposed upon his property. The assessors never had jurisdiction of his person, because he was a non-resident of the county, and the supervisors could base nothing upon their illegal action. The reassessment, therefore, was made without notice either actual or constructive.

The assessment and collection of a tax without adequate notice to the owner is taking property without due process of law. As Judge Cooley says in his work on Taxation: "Every inhabitant of the state is liable to have a demand established against him on the judgment of others regarding the sum which he should justly and equitably contribute to the public revenues. Every property owner in the state, whether an inhabitant or not, is liable to have a lien in like manner established against his property. Moreover, the persons who make the assessment lighten the burden upon themselves in proportion as they increase it upon others. In such proceedings, therefore, it must be a matter of the utmost importance to the person assessed that he should have some opportunity to be heard before the charge is fully established against him, and it would seem to be a dictate of strict justice that the law should make reasonable provision to secure him

N. Y. Rep.] Opinion of the Court, per VANN, J.

as far as may be against partiality, malice or oppression. * * * We should say that notice of proceedings in such cases and an opportunity for a hearing of some description were matters of constitutional right." (Cooley's Law of Taxation, 265, 266.)

When considering a case involving the right to reassess property, this court said: "The general theory under our laws for taxation of property is that the citizen to be affected must have some sort of notice of the proceeding to be had against his property, and that, in some form, he may be heard, if wrong is apprehended, before any portion of his estate is seized for the support of the government. * * *" (*Overing v. Foote*, 65 N. Y. 263, 269.)

There must be notice in some form, or at least adequate means of knowledge equivalent to notice, such as a general statute presumed to be known to all, or a proper advertisement fixing the time and place for a hearing, before a valid tax can be finally imposed either *in personam* or *in rem*. The taxpayer has an absolute right to be heard before some officer or tribunal authorized to correct errors, and unless this right is afforded any attempt at taxation is neither binding upon him personally nor a charge upon his property. In a recent case we held that where a levy of a tax was void because it was assessed in the name of one who was not the owner or occupant, it could not be cured even by a statute, nor be made a valid lien upon the lands except by proceedings for reassessment, requiring a hearing and notice to the owner or occupant. (*Hayner v. Hall*, 10 App. Div. 581; affirmed, on opinion below, 159 N. Y. 552.)

The subject of notice and the necessity for giving it in some form is so thoroughly considered by Judge CULLEN in the case last cited and the authorities are so thoroughly reviewed by him that we regard further discussion as unnecessary. Our conclusion is that the reassessment in question by the board of supervisors was, under the circumstances, a new and original assessment by that board, and that the same could not be made without notice to the landowner.

The order appealed from should, therefore, be reversed, with costs, and the motion to refund granted, with ten dollars costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, CULLEN and WERNER, JJ., concur.

Ordered accordingly.

172 316
78 AD'348

THE PEOPLE OF THE STATE OF NEW YORK ex rel. MORTIMER F. GLEASON, Respondent, v. JOHN J. SCANNELL, as Fire Commissioner of the City of New York, Appellant.

1. MANDAMUS — ALTERNATIVE WRIT — EFFECT OF A VERDICT DIRECTED AT REQUEST OF BOTH PARTIES. Where both parties to a trial of issues presented by an alternative writ of mandamus request the direction of a verdict, a verdict directed for the relator has the same effect as one found in his favor by a jury after a submission of the case, and where the judgment entered thereon has been affirmed by the Appellate Division the facts must be deemed settled in favor of the relator.

2. CIVIL SERVICE — LONG ISLAND CITY — REMOVAL OF FIREMAN APPOINTED UNDER CHARTER OF, BY FIRE COMMISSIONER OF GREATER NEW YORK — MANDAMUS. Where the power of appointing firemen was given by the charter of Long Island City to the board of fire commissioners, subject only to the limitation that the annual expenses of the department should not exceed a certain sum, a fireman, who was appointed by such board, after a successful civil service examination, has the right to retain his position until removed for cause upon notice and a hearing, and where he has been summarily removed by the fire commissioner appointed under the new charter of the city of New York, by which Long Island City was absorbed by the greater city, upon the ground that his appointment was illegal, he is entitled to a writ of mandamus requiring such commissioner to restore him to his position upon proof of his appointment by the board of commissioners of Long Island City, unless it is shown as a matter of defense by the commissioner removing him that the limitation prescribed by the charter of Long Island City was exceeded; and when such commissioner did not ask to go to the jury upon that question, the verdict directed for the relator has all the effect of a finding to the contrary.

People ex rel. Gleason v. Scannell, 69 App. Div. 400, affirmed.

(Argued June 11, 1902; decided November 11, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, made March 7, 1902, which affirmed an order of the Special Term

N. Y. Rep.]

Points of counsel.

granting a motion for a peremptory writ of mandamus requiring the defendant to reinstate the relator as a member of the fire department of the city of New York.

The facts, so far as material, are stated in the opinion.

George L. Rives, Corporation Counsel (James McKeen of counsel), for appellant. The obvious purpose of the action taken by the board of fire commissioners of Long Island City was to foist upon the Greater New York a number of additional firemen and extended additions to the plant of the fire department in violation of the plan of consolidation. The relator is one of a number of men appointed at or about the same time, and is chargeable with full knowledge of the essentially fraudulent character of this scheme. (*Hendrickson v. City of New York*, 160 N. Y. 144; *Stuber v. Coler*, 164 N. Y. 29.) The contention of the relator that the direction of a verdict in his favor, after a concession by the corporation counsel that there was no question of fact to be submitted to the jury, makes the direction of such a verdict the equivalent of a finding by the court determining all the facts in his favor, is entirely without force or merit. (Code Civ. Pro. § 2087.)

W. W. MacFarland and Nelson Smith for respondent. The exception to the direction of a verdict for the relator was not well taken. (*Milbank v. Jones*, 127 N. Y. 370; *Brennan v. Mayor, etc.*, 62 N. Y. 365; *Debautte v. Curiel*, 2 Misc. Rep. 170; *Boyer v. Fenn*, 19 Misc. Rep. 128; *U. S. v. Dickinson*, 15 Pet. 141-165; *Spiers v. Parker*, 1 T. R. 141; *Walton v. Mayor, etc.*, 26 App. Div. 76; *McDonald v. Mayor, etc.*, 68 N. Y. 23; *Smith v. City of Newburg*, 77 N. Y. 130; *Swift v. Mayor, etc.*, 83 N. Y. 528.) The principle of the constitutional and statutory provisions, that no unanimous decision of the Appellate Division that there is evidence supporting or tending to sustain a finding of fact or verdict not directed by the court shall be reviewed by this court, applies with equal force to a verdict directed, as this was, by the consent of the parties. (Code Civ. Pro. § 191.)

O'BRIEN, J. This proceeding originated in the relator's petition for a peremptory mandamus requiring the defendant to restore him to his position as a member of the fire department of the city of New York. On the application for the writ some of the material facts stated in the relator's petition were denied by the defendant and an alternative writ was issued to which the defendant made return. The issues thus presented by the petition, alternative writ and return were tried before the court and a jury on the 10th day of January, 1900, and the jury by direction of the court found a verdict for the relator.

At the close of the trial both sides insisted that there was no question for the jury, and both sides in effect requested a direction by the court. The court directed a verdict for the relator and the judgment was unanimously affirmed on appeal. If there was any dispute with respect to the facts stated in the relator's petition, which we cannot perceive, that dispute must be deemed to be settled in favor of the relator. The direction, having been requested by both sides, has the same effect as if the jury had found a verdict in relator's favor after a submission of the case to them. (*Adams v. Roscoe Lumber Co.*, 159 N. Y. 176; *Westervelt v. Phelps*, 171 N. Y. 212.) But of course the direction does not settle the law arising from the facts alleged by the relator. Whether upon these facts he was entitled to be restored to membership in the fire department is a question of law which this court can review. There is no case before us in the record except that of the relator, and we propose to decide that case and no other. In the briefs of counsel on both sides there is to be found considerable discussion with respect to other persons that it is said were appointed at or about the same time as the relator and removed under like circumstances. All we mean to say with respect to these parties is that their cases are not before us now and we decide nothing in regard to any case but the one presented by the record.

The relator's case, as we view it, seems to be a very plain and simple one without any serious obstacles in the way of

the relief which he demands. The undisputed facts upon which his claim is based are these: On the 17th day of November, 1897, the board of fire commissioners of Long Island City removed ten persons, who prior to that time had been a part of the force, and the removal was made on the ground and for the reason that these persons were not qualified inasmuch as they had not passed the civil service examination as required by law. This left ten vacant places in the force as it had previously existed. On the 24th day of November, 1897, the commissioners appointed to fill these vacancies ten other persons who had duly passed the civil service examinations and were qualified for the places. The relator was one of these persons, so that there cannot be any serious question with respect to the validity of the appointment. The power of appointment was conferred upon the commissioners by the city charter. They did not by that act increase the force or the expenses of the city, but merely kept it at the point where it was before. On the first day of January, 1898, the new charter of the city of New York went into complete operation, and Long Island City was absorbed in the greater city. By section 722 of the new charter the relator was made a member of the fire department of the new city, in which position he continued to serve down to the 19th day of March, 1898, when he was removed by the defendant. The only ground for the removal is stated in a written notice served upon the relator by the defendant to the effect that he had been advised by the corporation counsel that the appointment of firemen in Long Island City made in and subsequent to November, 1897, was illegal, and that the relator was relieved from all further duty in the department and that his right to be considered a member of the fire department was no longer recognized. It will be seen that the entire controversy turns upon the validity of the relator's appointment to the force in November, 1897. The power of appointment was given to the board that appointed the relator in general terms, subject to one limitation, and that was that the expenses of the department should not in any one

year exceed \$40,000. It is not seriously contended that the appointment of the relator and the nine other persons to fill the vacancy caused by the removal of an equal number who were not qualified to serve and were appointed in disregard of the regulations for the civil service, violated this limitation. The most that is claimed is that other and subsequent appointments did, but that question is foreign to the present case. It is proper, however, to observe with respect to this limitation and its effect upon the power of appointment that it was no part of the relator's case to show that the expense of the department was kept within the sum designated. The relator could make out his case by producing the written evidence of his appointment in the form of a resolution of the board. Whatever effect the limitation in regard to the expenses of the department contained in the charter had upon the validity of the relator's appointment to the force by the board, it was matter of defense. (*McNulty v. City of New York*, 168 N. Y. 117.) The defendant has no finding in this case that the limitation was exceeded. He did not ask to go to the jury upon that question, and the directed verdict has all the effect of a finding to the contrary. There was some proof given at the trial tending to show the expenses of the department down to the latter part of November of the year, but no one would claim that it was conclusive, even if it was competent, and as the burden of furnishing such a finding as an answer to the application, if it was an answer, was upon the defendant, this court cannot now assume such a fact to be conclusively established upon the record, even if it could be held to be a complete answer to the application. (*Milbank v. Jones*, 127 N. Y. 370; *Rowell v. Janvrin*, 151 N. Y. 60; *Brennan v. Mayor, etc., of N. Y.*, 62 N. Y. 365.)

This case, when the most favorable view for the defendant is taken, may be summarized in this way: The relator is seeking to enforce a right founded upon a statute, namely, the right to retain his position until removed for cause and upon notice and a hearing. The defendant is seeking to defeat that right by a limitation in the statute in the nature of a

N. Y. Rep.] Concurring opinion, per CULLEN, J.

proviso. The rule of law in such cases is that the defendant must not only show that the proviso as matter of law defeats the right claimed, but that as matter of fact it is applicable to the relator, and so far as this depends upon an inquiry with respect to facts *dehors* the statute these facts must in this court appear to be conclusively established by some affirmative finding. Whatever may be said with respect to the first condition, it is very clear that the last one is not present in the record before us, and, therefore, the defendant has failed to meet and answer the relator's case. The power to appoint as many firemen as may be necessary is in the enacting clause of the statute and the provision that the expense shall not exceed \$40,000 each year is in a subsequent clause in the nature of a proviso.

The enacting clause being general, followed by a subsequent clause to qualify or restrain its generality in the nature of a proviso, the restraining clause must be held to be matter of defense and the burden is upon the party who claims under it to show that his case comes within the words as well as the reason of the qualifications. (*Rowell v. Janvrin*, *supra*; *United States v. Dickson*, 15 Peters, 165; *Ryan v. Carter*, 93 U. S. 83; *Spieres v. Parker*, 1 T. R. 141; *Potter's Dwaris* on Stat. 118, 119.) On the record now before us it must, therefore, be held that the relator was legally appointed and improperly removed and so the order appealed from must be affirmed, with costs.

CULLEN, J. (concurring). I concur in the conclusion of Judge O'BRIEN that this judgment should be affirmed because the relator was appointed to fill a vacancy in the then existing force. I also agree with the learned judge, that we are not called upon to decide the status or rights of the sixty or seventy appointments to the new fire companies established by the resolution of December 14, 1897; but I fear that there are some views expressed in his opinion which may affect the cases of these latter appointees, from which views I differ. It is true that the direction in the statute (§ 4,

chap. 122, Laws of 1894), "but the said commissioners shall not have the right to select or appoint employees in said department in sufficient number to cause the expense of the department to exceed the sum of forty thousand dollars per annum," is in the nature of a proviso, but the rule in this state is that a proviso prevails over the general purview of the statute. (Opinion by CHURCH, Ch. J., *Matter of New York and Brooklyn Bridge*, 72 N. Y. 530.)

Probably in every municipal charter in this state there are found stringent limitations on the power of the municipal officers to incur debts or obligations. The charter of Long Island City (Chap. 461, Laws of 1871) forbids the common council to incur debts or to use money for any purpose except for that for which it had been appropriated. By chapter 232 of the Laws of 1890, as amended by the act of 1894, the fire department of the city was reorganized. Its management and control, the appointment of firemen, the regulation of their salaries within certain prescribed limits and the purchase of fire engines and supplies, were vested exclusively in the board of fire commissioners, independent of any other branch of the government. The only limitation on the power of the board was that the expense of the department should not exceed \$40,000 annually. This limitation should be rigidly upheld. The scheme of the charter of Long Island City is not in this respect singular. It is the plan adopted in the general act relating to the cities of the second class (Chap. 182, Laws of 1898) which grants to the heads of the various city departments exclusive power to fix the number and salaries of their employees, but which gives to the common council the right to fix the total expenditure of each department.

In a case recently before us, which arose under that statute, it was said by Judge MARTIN: "It (the common council) may, therefore, by refusing to appropriate the amount called for by the board, limit the expenditures of any office or department to the amount appropriated, and thus lessen the expenses of the city government." (*Pryor v. City of Rochester*, 166 N. Y. 548, 559.)

N. Y. Rep.]

Statement of case.

This plan of municipal government can be made to work successfully only by holding that every appointment by the head of a department of an employee whose salary involves an expenditure in excess of the amount appropriated for the use of the department is illegal and void, excepting, of course, in cases where the number or salaries of subordinates are prescribed by statute. It does not appear, however, in this case that the fire department, as organized previous to the establishment of the new fire companies, involved an expenditure in excess of that prescribed by statute, and, therefore, the relator's appointment to a vacancy in the force as it had previously existed may well be sustained. The increase of the force by the resolution of December 14, to an extent involving on its face an annual outlay for salaries far in excess of that prescribed by statute, presents a very different question, to be dealt with when it comes before us.

PARKER, Ch. J., GRAY, HAIGHT and WERNER, JJ., concur with O'BRIEN, J.; VANN, J., concurs with CULLEN, J.

Order affirmed.

In the Matter of the Application of JOHN J. SHAUGHNESSY, Appellant, for a Peremptory Writ of Mandamus against CHARLES V. FORNES et al., Constituting the Board of Aldermen of the City of New York, Respondents.

NEW YORK (CITY OF)—POWER OF BOARD OF ALDERMEN TO ELECT ITS OWN OFFICERS AND APPOINTEES NOT RESTRICTED BY STATUTORY PROVISIONS RELATING TO VETERAN SOLDIERS AND CIVIL SERVICE POSITIONS. A veteran soldier, who was an assistant sergeant-at-arms to the council of the city of New York when the council was abolished and its powers and duties imposed upon the board of aldermen by the new charter of the city (L. 1901, ch. 466), is not entitled to a writ of mandamus requiring the board of aldermen to elect him to the position of assistant sergeant-at-arms to that body, under the statute giving preference to veteran soldiers (L. 1899, ch. 370, § 21), or the provision of the charter (§ 1548) requiring that any clerk or employee of any department of the city whose position or employment may be abolished by the abolition of any department, or its consolidation with another, shall be reinstated in

the same or a similar position or employment in another department since the board of aldermen is a legislative body, with power to elect its own officers and attendants, untrammelled by the provisions of the statutes invoked by the relator, which were intended to govern appointments in the various departments of the civil service of the city, and have no application to elective officers or appointees.

Matter of Shaughnessy v. Fornes, 73 App. Div. 462, affirmed.

(Argued October 7, 1902; decided November 11, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 12, 1902, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the defendant to transfer him to the position of assistant sergeant-at-arms to the board of aldermen of the city of New York.

The facts, so far as material, are stated in the opinion.

Thomas H. York for appellant. The appellant is still in the public service and should be transferred and reinstated as assistant sergeant-at-arms to the board of aldermen of the city of New York. He cannot by reason of the abolition of the council be suspended or removed from the public service, nor can the amended charter of the city of New York be construed to permit his suspension or removal. (L. 1899, ch. 370, § 21; L. 1901, ch. 533; L. 1901, ch. 466, § 1543; *Matter of Breckenridge*, 160 N. Y. 103; *People ex rel. v. Scannell*, 27 Misc. Rep. 734; *Matter of Stutzbach*, 62 App. Div. 219; 168 N. Y. 416; *Matter of Pratt v. Phelan*, 67 App. Div. 349.) The appellant was not "a person holding a strictly confidential position." (L. 1899, ch. 370, § 21; *People ex rel. v. Coler*, 31 App. Div. 523; *People ex rel. v. Lyman*, 157 N. Y. 368; *People ex rel. v. Gardiner*, 157 N. Y. 520; *People ex rel. v. Palmer*, 152 N. Y. 220; *People ex rel. v. Wurster*, 151 N. Y. 360; *People ex rel. v. Barker*, 14 Misc. Rep. 360; *People ex rel. v. Sutton*, 88 Hun, 173; *People ex rel. v. Dalton*, 158 N. Y. 204; *People ex rel. v. Tobey*, 153 N. Y. 387.) The position held by appellant prior to the 1st day of January, 1902, comes within the provisions of section 1543 of the charter of

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

the city of New York as amended, and he should have been transferred as assistant sergeant-at-arms to the board of aldermen, there being vacancies in such positions in said board. Said section 1543 is without limitation or qualification, and covers public employees of every class, who do not hold important municipal office. (*Matter of Breckenridge*, 160 N. Y. 103; *Matter of Pratt v. Phelan*, 67 App. Div. 349.)

George L. Rives, Corporation Counsel (*Theodore Connolly* and *William B. Crowell* of counsel), for respondent. An assistant sergeant-at-arms is a strictly confidential officer who is elected and not appointed. (L. 1897, ch. 387, § 27; *Matter of Ostrander*, 12 Misc. Rep. 476; 146 N. Y. 404; *People ex rel. v. Gardiner*, 157 N. Y. 520; *People ex rel. v. Dalton*, 158 N. Y. 204; *People ex rel. v. Tobey*, 153 N. Y. 381.) Each legislative body, on its formation, has a right to elect its own assistant sergeant-at-arms. (*Wetmore v. Storey*, 22 Barb. 414; *Anderson v. Bunn*, 6 Wheat. 204; *People ex rel. v. Keeler*, 99 N. Y. 463; *Briggs v. Matsell*, 2 Abb. Pr. 156; *Mongeon v. People*, 55 N. Y. 613; *Nash v. White's Bank*, 105 N. Y. 243.)

O'BRIEN, J. The courts below have denied the relator's application for a peremptory writ of mandamus, requiring the board of aldermen of the city of New York to elect him to the position of an assistant sergeant-at-arms to that body. There is no dispute with respect to the facts. The relator is a veteran soldier, and on the 6th of December, 1898, was appointed an assistant sergeant-at-arms to the council of the city of New York, pursuant to section twenty-seven of the charter. At the time of his appointment the municipal assembly consisted of the council and board of aldermen. By an amendment of the charter (Chapter 446, Laws of 1901) the legislative power of the city became vested in the board of aldermen; the council being thus abolished, all the powers and duties theretofore exercised by the municipal assembly were devolved upon the board of aldermen. This

new board has power, among other things, to appoint a sergeant-at-arms and assistants. The relator, being a veteran soldier and having been an assistant sergeant-at-arms of the council as it existed prior to the amendment of the charter, claims that upon the abolition of that body he was entitled to be transferred to a similar position in the board of aldermen. This claim is made under section twenty-one of chapter three hundred and seventy of the Laws of 1899. That statute, by its terms, has no application to certain positions therein described as confidential, and the principle upon which this case has been decided was that an assistant sergeant-at-arms occupies confidential relations to the appointing body, and, hence, was excepted from the requirements of the statute giving preference to veterans.

It may be that the position of assistant sergeant-at-arms to the board of aldermen is what the statute describes as confidential; but we do not think it necessary to pass upon that question in this case, since there is a broader ground upon which we prefer to place our decision. The board of aldermen is a legislative body. It has the power to elect its own officers and attendants, and neither the statute giving preference to veteran soldiers nor section fifteen hundred and forty-three of the charter has any application to such a position. These statutes were obviously intended to govern appointments in the various departments of the civil service of the city. They have no application to elective officers or appointees. No one yet has asserted that the general laws in regard to veteran soldiers, or the statute which regulates appointments in the civil service, have any application to legislative bodies. The senate and assembly of this state still have the power to elect their own officers and attendants, untrammelled by any of the restrictions contained in the Civil Service Law, or any other statute in regard to appointments. The same principle is applicable to the board of aldermen of the city of New York. There is no law that we are aware of which requires that body to elect any particular person to the position of assistant sergeant-at-arms; and so, whether the position is

N. Y. Rep.]

Statement of case.

confidential or not, the relator was not entitled to compel the board by mandamus to elect him.

The case was correctly decided below, and the order appealed from should be affirmed, with costs.

PARKER, Ch. J., HAIGHT, VANN, CULLEN and WERNER, JJ., concur; BARTLETT, J., not voting.

Order affirmed.

WILLIAM E. D. STOKES, Appellant, v. ELIZUR V. FOOTE, as
Executor of EDWARD S. STOKES, Deceased, Respondent.

1. CONTRACT — CONSIDERATION — CONDITION PRECEDENT. A provision in an agreement made by a creditor with a debtor, who had deposited with him corporate bonds as collateral security, to purchase shares of corporate stock held by a third person or a portion thereof and to sell one half of the whole or of such portion to the debtor, is not the sole consideration of an entire agreement so that failure to purchase all of such third person's stock will render the agreement unenforceable, where it contains independent covenants on the part of the creditor whereby he surrenders his absolute right to dispose of his stock and agrees to sell it to the debtor on credit or to dispose of it on joint account at the latter's option; nor is it a condition precedent to the creditor's right to hold the bonds in his possession for the purposes mentioned in the agreement.

2. JUDGMENT — CONCLUSIVENESS. The provisions of a decree concerning a question not necessarily involved in the issues or presented to the court are not final and conclusive upon the parties.

3. TRIAL — RES JUDICATA. An issue finally determined in a former suit between the parties need not be submitted to the jury.

4. CONSTRUCTION OF CONTRACT — QUESTION OF LAW. The question whether the failure of a party to a contract to purchase all the shares of stock owned by another amounts to a breach of the contract calls for its construction and is a pure question of law.

5. QUESTION FOR JURY — IMMATERIALITY. An immaterial question need not be submitted to the jury.

Stokes v. Stokes, 49 App. Div. 302, reversed.

(Argued October 20, 1902; decided November 11, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered March 23, 1900, sustaining defendant's exceptions ordered to

be heard in the first instance by the Appellate Division and granting a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Benjamin F. Tracy for appellant. The present verdict was properly directed unless the evidence would have justified the jury in finding that the bonds referred to were held as collateral security for the payment of the notes and for no other purpose. (*Woodgate v. Fleet*, 44 N. Y. 1; *Stannard v. Hubbell*, 123 N. Y. 520; *House v. Lockwood*, 137 N. Y. 259; *Bigelow on Estop.* 152; *Reynolds v. Stockton*, 140 U. S. 254; *Jackson v. Wood*, 3 Wend. 37; *Jackson v. Wood*, 8 Wend. 10; *Sweet v. Tuttle*, 14 N. Y. 465; *Campbell v. Consalus*, 25 N. Y. 613; *People ex rel. v. Johnson*, 38 N. Y. 63; *Hymes v. Estey*, 116 N. Y. 501; *Lorillard v. Clyde*, 122 N. Y. 41.) The failure of the plaintiff to purchase all of Read's 1,963 shares of stock constituted no breach of contract of August eighteenth, either total or partial. (*Burr v. A. S. S. Co.*, 17 Hun, 188; *People v. Lee*, 104 N. Y. 441.)

John G. Milburn and *Charles E. Hughes* for respondent. As a verdict was directed for the plaintiff all contested facts must be treated as established in the defendant's favor. (*Stone v. Flower*, 47 N. Y. 566; *Trustees v. Kirk*, 68 N. Y. 459; *F. Nat. Bank v. Dana*, 79 N. Y. 108; *Train v. Holland Co.*, 62 N. Y. 598; *Ormes v. Dauchy*, 82 N. Y. 444; *Higgins v. Eagleton*, 155 N. Y. 466; *Bank v. Weston*, 159 N. Y. 201.) The defendant made a valid tender of the amount due upon the four notes in suit, and unless the plaintiff was entitled to retain the Hoffman House bonds for some purpose other than to secure these notes, the counterclaim was established. (*Cass v. Higenbotam*, 100 N. Y. 248; *Wheelock v. Tanner*, 39 N. Y. 481; *H. Ins. Co. v. P. Ins. Co.*, 118 N. Y. 165; *Bailey v. County of Buchanan*, 115 N. Y. 297; *Kortwright v. Cady*, 21 N. Y. 343; *E. F. Ins. Co. v. Norris*, 74 Hun, 527.) Independently of the agreement of August 18,

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

1891, there never was any pledge or agreement under which the plaintiff was entitled to hold the Hoffman House bonds for any purpose other than to secure the four notes in suit. (*Forbes v. Jackson*, L. R. [19 Ch. Div.] 615; *Ellsworth v. Lockwood*, 42 N. Y. 98; Baylies on Sureties, 364-370; *Baker v. Thrasher*, 4 Den. 493; *Eckford v. De Kay*, 26 Wend. 29; *McCauley v. Porter*, 71 N. Y. 173; *Randall v. Sanders*, 87 N. Y. 578; *Pond v. Harwood*, 139 N. Y. 111; *Stokes v. Stokes*, 23 App. Div. 423; *Marsh v. McNair*, 99 N. Y. 174; *Thomas v. Scutt*, 127 N. Y. 133; *Morgenstern v. Davis*, 37 N. Y. S. R. 819; *Engelhorn v. Reitlinger*, 122 N. Y. 76; *House v. Walch*, 144 N. Y. 418.) The judgment in the equity suit was a conclusive adjudication that W. E. D. Stokes had failed to perform the consideration of the agreement of August 18, 1891, and that for this reason it could not be enforced against E. S. Stokes. (1 Freeman on Judg. [4th ed.] § 248; *Smith v. Kernocken*, 7 How. [U. S.] 198; *Strang v. Moog*, 72 Ala. 460; *People's Bank v. Eherts*, 96 Mich. 396; *Williamsburgh Bank v. Town of Solon*, 136 N. Y. 465; *Blackinton v. Blackinton*, 113 Mass. 231; *Parnell v. Hahn*, 61 Cal. 131; *Dunham v. Bower*, 77 N. Y. 76; *Gates v. Preston*, 41 N. Y. 113; *Blair v. Bartlett*, 75 N. Y. 150; *Gardiner v. Buckbee*, 3 Cow. 120.) If the judgment in the equity suit could be treated as leaving open the question of the performance by W. E. D. Stokes of the consideration of the August agreement, the evidence received upon the trial was sufficient to show that it had not been performed, and it was error to direct a verdict for the plaintiff. (*Kenyon v. K. T. & M. M. A. Assn.*, 122 N. Y. 247; *Trustees of Easthampton v. Vail*, 151 N. Y. 463; *F. Nat. Bank v. Dana*, 79 N. Y. 108; *White v. Hoyt*, 73 N. Y. 505; *Etting v. Bank*, 11 Wheat. 59.)

BARTLETT, J. The defendant, Edward S. Stokes, and one Cassius H. Read, prior to the year 1891, were equal owners of \$750,000, par value, of the stock issued by the hotel corporation known as "The Hoffman House" in the city of New

York, which was divided into 2,500 shares of preferred stock and 5,000 shares of common stock. There was also issued \$500,000 in bonds, secured by mortgage on the corporate property, which were nearly all owned by the defendant, Edward S. Stokes, a few being held by Read.

During the year 1890 differences arose between Edward S. Stokes and Read which led to negotiations being opened between the former and his cousin, William E. D. Stokes, the plaintiff, looking to an arrangement which would result in the retirement of Read and the substitution of William in the corporate business.

During these early negotiations William loaned large sums of money to Edward and to Read, to secure which he held collateral security, and as a result of further discussion between the parties their respective rights were fixed by an agreement in writing, dated August 18th, 1891, of which the following is a copy :

“This agreement made the 18th day of August, 1891, between Edward S. Stokes and W. E. D. Stokes, witnesseth :

“Whereas, the said W. E. D. Stokes has heretofore, with the consent of the said Edward S. Stokes, purchased from Cassius H. Read 1,250 shares of his preferred stock and 500 shares of his common stock of the ‘Hoffman House,’ a corporation, and with the knowledge and consent of the said Edward S. Stokes is about to purchase from said Read the remainder of his stock, to wit, 1,963 shares of common stock, or a portion thereof, with the intent that they may together be the owners of the whole of the stock of said corporation ;

“Whereas, the whole of the issue of the \$500,000 of bonds of said ‘Hoffman House’ secured by a mortgage to the Farmers’ Loan & Trust Company — except \$25,000 given up and canceled — are now owned and held by said Edward S. Stokes, except a portion held and controlled by him as a pledge from said Read, for money due by him to said Edward S. Stokes ;

“Whereas, said Edward S. Stokes hereby declares that the indebtedness of the old firm of C. H. Read & Co. has been paid and extinguished, except the contested claim now in suit

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

against them by John W. Mackey, except the claim against them by Edward S. Stokes, and except about \$15,000 for taxes which said C. H. Read & Co. are bound to pay; and further declares that there is no indebtedness of the 'Hoffman House' except as shown in their balance sheet of 31st July, 1891, for \$66,353.49 and for current expenses.

"Now, therefore, in consideration of the premises, and of the covenants herein by each made to the other, and for a good and valuable consideration by each paid to the other, the said parties hereby covenant and agree as follows:

"*First.* Neither of said parties will sell any of his stock of the 'Hoffman House' without first consulting with and offering to sell the same to the other, and if a sale is made by one, the other party shall have the option to make it a sale for joint account.

"*Secondly.* Said Edward S. Stokes shall have, for his services as an officer of said corporation, a salary not to exceed four hundred dollars a month. No new enterprises or business shall be undertaken or any liability incurred by said corporation outside of the regular business of managing the present hotel, restaurants and cafes, except with the express consent in writing of said W. E. D. Stokes.

"*Thirdly.* The said W. E. D. Stokes shall have two of the directorships of said corporation for himself or his nominees.

"*Fourthly.* For the consideration aforesaid, the said Edward S. Stokes guarantees the said W. E. D. Stokes that there are no other claims and debts against the 'Hoffman House' except those shown on said balance sheet of 31st of July, 1891, and the current expenses and guarantees and indemnifies him against all claims against the 'Hoffman House' by said C. H. Read & Co., or John W. Mackey, or said Edward S. Stokes, or any other persons as the creditors of said C. H. Read & Co.

"*Fifthly.* The said Edward S. Stokes further covenants and agrees not to sell or dispose of any of the bonds of the 'Hoffman House,' owned or held by him as aforesaid, without the express consent of said W. E. D. Stokes, and also that the

\$25,000 of the \$50,000 of bonds received from said Read, not yet canceled, shall be canceled pursuant to the terms of the mortgage on 1st of July, 1892, and meantime held solely for that purpose, and no interest shall be paid thereon.

"*Sixthly*. And as security for these guarantees, for a loan of about \$32,000, and for any obligation of said Edward S. Stokes to W. E. D. Stokes, connected with said Read, and against any foreclosure of the said mortgage, said Edward S. Stokes has deposited with said W. E. D. Stokes bonds of said 'Hoffman House' to the par value of \$150,000.

"*Seventhly*. The said W. E. D. Stokes agrees to sell and transfer to said Edward S. Stokes one-half of the whole, or of such portion of said 1,963 shares of common stock as he may purchase from said Read, at the price he pays for said shares, with interest at six per cent on his note at twelve months, with one renewal if he desires, for twelve months longer, with the stock so sold as collateral. Upon payment of said price, at the time above specified, the shares sold shall be delivered to said Edward S. Stokes, and he shall, in the meantime, receive the dividends thereon.

"*Eighthly*. For any violation of this agreement each party shall have a claim and charge against the other on the books and accounts of the Hoffman House.

"In witness whereof, we have hereto set our hands and seals the day above written.

"E. S. STOKES [SEAL],

"W. E. D. STOKES [SEAL]."

Prior to the execution of this agreement, and on the 1st day of May, 1891, Edward, the defendant, borrowed from William, the plaintiff, the sum of \$32,300 on three promissory notes, and upon the 14th day of August following the further sum of \$4,000, for which a fourth note was given, making a total of \$36,300. As collateral security Edward delivered to William 30 United Lines Telegraph bonds and 125 Hoffman House bonds. William had also purchased all of Read's preferred stock in the Hoffman House corporation, 1,250 shares, and 500 shares of his common stock.

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

Read at this time owed William \$25,000, represented by two notes, one for \$10,000, indorsed by Edward, the other for \$15,000, guaranteed by Edward. Read had deposited with William as collateral security for this indebtedness 1,963 shares of the common stock of the Hoffman House corporation, being all the common stock he then owned. The loan represented by the four notes was reduced to about \$32,000.

This was the situation at the time the agreement of August 18th, 1891, was executed.

In the year 1892 disagreements arose between Edward and William, which culminated on October 12th, 1892, when William began two actions in the Superior Court of the city of New York against Edward, one on three of the notes and the other on the fourth note, already mentioned. These actions were consolidated and that action is the one before the court.

Immediately after this action was begun, Edward brought a suit in equity in the Supreme Court against William to enjoin its prosecution on the ground that the collateral in William's hands was held only as security for the four notes and that the agreement of August 18th, 1891, had been abandoned.

A preliminary injunction was issued in the equity suit, but was vacated on the motion to continue it, the court holding that the action would not lie, as Edward's remedy at law was adequate.

Edward thereupon served his answer in this action in which he admitted giving the notes and that they were due and unpaid and pleaded a tender of payment of the notes, interest and costs on the condition that William surrender the notes and the collateral security held by him, which tender was refused.

Edward then set up by way of counterclaim the giving of the four notes in suit, alleged that the collateral in William's hands was held only as security for their payment, repeated the allegations of tender, demand and refusal, and alleged that William converted the collateral security to his own use

and demanded judgment for its value after deducting amount due on notes, with interest.

William served a reply denying that the collateral was held only as security for the payment of the notes; also denying the value of the bonds, and alleged they had no market value. The reply admitted that 30 United Lines Telegraph bonds were held as collateral security only for the payment of the notes.

(It may be remarked here that on the last trial of this action it was stipulated, in open court, that no question is made as to the United Lines bonds.)

The reply then set up the agreement of August 18th, 1891, which stated that Edward *had* deposited \$150,000 in Hoffman House bonds, but that in fact he had only deposited \$125,000 of said bonds, no more and none other, and that they were still held by William. The reply further alleged that Edward had neglected and refused to make the deposit of the additional bonds under said agreement to the injury and damage of plaintiff. There was also a denial of the alleged conversion of the collateral security.

This case has been twice tried and resulted each time in a directed verdict for the plaintiff. The judgment entered at the first trial was affirmed by the General Term of the Superior Court and in this court. (155 N. Y. 581.) A motion for a new trial was subsequently granted by the court below on the ground of newly-discovered evidence. The second trial resulted in a directed verdict for the plaintiff and the defendant's exceptions were ordered to be heard at the Appellate Division in the first instance. The Appellate Division sustained the defendant's exceptions and ordered a new trial. From this order the plaintiff, William E. D. Stokes, has appealed to this court, stipulating for judgment absolute in case of affirmance.

It now becomes necessary to consider more in detail the history of this action and the equity suit to which reference has been made.

When this case was before us on the first appeal it was

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

held that the trial court properly directed the verdict in favor of the plaintiff, as the defendant had failed to establish his counterclaim by proving that the bonds were held by the plaintiff as collateral security for the payment of the notes and for no other purpose. This decision was rendered by a divided court, Judges HAIGHT and MARTIN delivering the prevailing opinions, and Chief Judge PARKER and Judge GRAY writing dissenting opinions.

The equity suit, although begun after the institution of this action, was first tried. William, as defendant in the equity suit, answered and set up a counterclaim, to which Edward replied. The issues raised by the counterclaim and reply alone were tried, and resulted in a judgment dismissing the complaint and counterclaim, the latter on the merits, both without costs; also adjudging that plaintiff was not entitled to an injunction; also that defendant not having purchased all of Read's common stock of the Hoffman House corporation, 1,963 shares, could not enforce agreement of August 18th, 1891. The General Term reversed this judgment, but on appeal this court reversed the General Term and affirmed the judgment of the Special Term, on a vote of four to three (148 N. Y. 708).

As one of the important questions on this appeal is the scope and effect of this judgment, it will be necessary to determine the precise issues raised by the pleadings in the equity suit.

In the action now before us the judgment in the equity suit is not set up in the answer as a bar, nor is it referred to in any way.

The record in the case at bar shows that the counsel for plaintiff introduced in evidence the judgment roll in the equity suit.

The defendant and respondent seeks to maintain the following propositions on this appeal: (1) That the contract of August 18th, 1891, was entire, and the purchase of all of Read's 1,963 shares of stock by the plaintiff was a condition precedent to his right to hold the 125 bonds then in his pos-

session for any of the purposes mentioned in that contract. (2) That the judgment in the equity suit concludes the plaintiff upon all the issues in the present action. (3) That the direction of a verdict was, in any aspect of the case, error, as there were questions which should have been submitted to the jury.

First, as to the construction of the agreement of August 18th, 1891.

It starts out with certain recitations, which, taken in connection with the agreement, are of controlling importance. The first declares that William, with the consent of Edward, had purchased from Read 1,250 shares of his preferred stock and 500 shares of his common stock of the Hoffman House corporation, and with the knowledge and consent of Edward, William was "about to purchase from said Read the remainder of his stock, to-wit: 1,963 shares of common stock, *or a portion thereof*, with the intent that they may together be the owners of the whole of the stock of said corporation."

This recitation being read in connection with the subdivision of the agreement marked "Seventhly," leaves no room for two constructions. That subdivision is as follows: "The said W. E. D. Stokes agrees to sell and transfer to said Edward S. Stokes one-half of the whole, *or of such portion* of said 1,963 shares of common stock as he *may* purchase from said Read, at the price he pays for said shares, with interest at six per cent on his note at twelve months, with one renewal if he desires for twelve months longer, with the stock so sold as collateral. Upon payment of said price, at the time above specified, the shares sold shall be delivered to said Edward S. Stokes, and he shall, in the meantime, receive the dividends thereon."

The counsel for Edward throughout these litigations have insisted that this agreement obligated William to purchase all of the 1,963 shares of common stock owned by Read, and failing in that, this agreement being entire, there was an absolute failure of consideration, rendering it unenforceable.

It was clearly in the minds of the parties that William

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

might be able to purchase only a portion of Read's stock. It is true that Edward and William desired, if possible, to become the owners of the entire stock of the corporation, but owning between them, as they did, all of the preferred stock and a large majority of the common stock, there was not the slightest difficulty in operating this agreement, if, for any reason, William failed to acquire all of the stock held by Read.

In order to give some force and effect to the provision in the recitation that William was to purchase this stock, "*or a portion thereof*," and the further words in the seventh subdivision of the agreement following William's agreement to sell and transfer to Edward "*one-half of the whole, or such portion of said 1,963 shares of common stock as he may purchase from said Read*," it has been suggested that these words were inserted in order to exclude from William's obligation to buy such portion of the stock as Edward might purchase. It is sufficient to say that this construction is not justified either by the language of the agreement or the surrounding circumstances. If anything is clearly disclosed in the litigations to which this agreement has given rise, it is that Edward was indebted to William at the time of its execution and in need of financial assistance.

The seventh provision of the contract provides that whether William purchased the whole or a portion of Read's stock, he was to sell one-half of the amount so acquired to Edward on his note at twelve months, with a renewal for a like term if desired. This provision excludes any inference, from the general situation of the parties, that it was within their contemplation that Edward was to buy any of the stock of Read. To say that William rests under the positive covenant to purchase all of Read's stock is to make a new contract between the parties.

The next recitation in the agreement deals with the ownership of the \$500,000 of bonds, which is not material to this controversy. Then follows the recitation that Edward declares that the indebtedness of the old firm of C. H. Read & Co.

had been paid and extinguished, except the contested claim in suit against them by John W. Mackey, except the claim against them by Edward, and except about \$15,000 for taxes, which C. H. Read & Co. were bound to pay, and further declared that there was no indebtedness of the Hoffman House corporation except as contained in a certain balance sheet for \$66,353.49 and current expenses. Then follow the express covenants in the agreement: (1) Neither of the parties was to sell any of his stock without consulting with and offering to sell it to the other, and, if a sale was made, the other party had the option to make it a sale on joint account; (2) Edward to have a certain salary and no new enterprise or business were to be begun or liability incurred by the corporation outside of its regular business except with the consent of the parties in writing; (3) William was to have two of the directorships of said corporation; (4) Edward guaranteed William that there was no other claims against the Hoffman House corporation except those disclosed in the balance sheet and the current expenses, and guaranteed and indemnified him as to all claims against the Hoffman House corporation or C. H. Read & Co., or John W. Mackey or himself, or any other persons as the creditors of C. H. Read & Co.; (5) Edward further agreed not to sell any of his Hoffman House bonds without the consent of William, and also covenanted to cancel certain bonds deposited with him by Read pursuant to the terms of the mortgage, and no interest was to be paid thereon; (6) and, as security for these guaranties, for a loan of about \$32,000, and for any obligation of Edward to William, connected with said Read, and against any foreclosure of said mortgage, Edward "*has deposited with said W. E. D. Stokes bonds of said Hoffman House to the par value of \$150,000;*" (7) (this covenant has already been considered in connection with the obligation of William to purchase Read's common stock); (8) in case of a violation of the agreement each party was to have a claim and charge against the other on the books and accounts of the Hoffman House.

It being clear, as we have pointed out, that William did not

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

covenant absolutely to purchase the entire common stock of Read, it is obvious upon the face of this agreement that it contains independent covenants to be separately performed and that William's covenant to purchase the stock of Read is not the sole consideration of an entire agreement.

Judge Story says that "An entire contract is a contract, the consideration of which is entire on both sides. The entire fulfillment of the promise by either is a condition precedent to the fulfillment of any part of the promise by the other." (Story on Contracts [4th ed.], § 22.) "In contracts with executory considerations, if the performance or satisfaction of the consideration forms a condition precedent to the liability under the contract, the failure of consideration discharges the liability." (Leake on Contracts, p. 631.)

As already pointed out, William was the owner of 1,250 shares of the preferred stock and 500 shares of the common stock of the Hoffman House corporation previous to the making of the agreement of August 18th, 1891. The agreement discloses in its first subdivision that William had surrendered his absolute power to dispose of his stock and agreed to sell the same to Edward, or make it a sale on joint account at his option.

It has been argued that this is a mere negative covenant. An agreement to shackle the absolute power to dispose of a large amount of personal property and render it subject to option is, of itself, a valuable consideration. Furthermore, the covenant entered into by William to sell to Edward the whole or such portion of the stock as he should purchase from Read on a credit of one or two years, at the option of the latter, also expresses a valuable consideration. It confers upon Edward a long term of credit and ties up the property of William.

It remains to consider the sixth subdivision of the agreement which has an important and controlling effect upon the construction thereof. By the fourth subdivision Edward entered into certain guaranties as to claims against the Hoffman House for William's indemnification, and by the first

and second subdivisions of the agreement he had covenanted not to sell any of his stock of the Hoffman House corporation except under certain conditions already referred to, and that no liability should be incurred by the corporation outside of its regular business except with the consent, in writing, of William.

It rests upon undisputed evidence that Edward, prior to the execution of the agreement of August 18th, 1891, had deposited with William 125 bonds of the Hoffman House corporation as collateral security for a certain indebtedness due from him to William. It also appears that at the time of the execution of the agreement William still held as collateral these 125 bonds. The legal effect of the agreement was to treat these bonds as redelivered by Edward to William under its provisions. It is also undisputed that notwithstanding the agreement states in its sixth subdivision that 150 of the Hoffman House bonds *had* been deposited with William, as matter of fact the remaining 25 bonds had not been so deposited.

At the trial of the equity suit William testified that Edward stated at the interview when the contract was signed: "Sign it as if you had received the \$150,000 worth of bonds; the other \$25,000 of bonds are downstairs in the safe and I will give them to you." William also swears they went downstairs, the bonds were not there and Edward said that he had forgotten that he had deposited them in the safe deposit company and was to get them at once. Edward was afterwards on the stand and did not contradict this testimony. These 25 bonds were treated as already delivered under the plain reading of the contract at the time of its execution and such delivery was in no way dependent upon William purchasing the whole, or any part, of Read's 1,963 shares of common stock, or performing any other covenant of the agreement.

This instrument, considered upon its face and regarding the circumstances existing at the time of its execution, makes it clear that William actually held 125 of the Hoffman House bonds and was entitled to hold 25 more as collateral to the

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

guaranties of Edward; to the loan of \$32,000; for any obligation of Edward to William connected with Read; and against any foreclosure of the Hoffman House mortgage.

It is undisputed that William did purchase 500 of the 1,963 shares of Read's common stock, after the execution of the agreement of August 18th, 1891, paying therefor some \$10,000. Edward swears to the purchase in his complaint and reply in the equity suit.

We thus have part performance by William of an agreement, not entire, but containing independent covenants.

This case has been argued as if William, as a stranger, was to become practically the partner of Edward in business, and that before the agreement of August 18th, 1891, could possess vitality or binding force, William must purchase all of Read's stock. This position is not only unsound for the various reasons already given, but on the additional ground that William did not occupy the attitude of a stranger seeking to gain admittance to a going and profitable business, but rather the position of one who had advanced some \$59,300 in aid of a struggling enterprise before the agreement was signed and was, under its provisions, to assure a possible obligation to pay out \$40,000 more. In other words, he might ultimately have at risk \$100,000 more or less.

Second, as to the contention that the judgment in the equity suit concludes the plaintiff on all the issues in this action.

It must be admitted that the judgment in the equity suit adjudges that William was bound to purchase all of Read's 1,963 shares of the common stock of the Hoffman House corporation, and having failed to do so, by reason of Read's refusal to sell, the contract could not be enforced against Edward. It is well settled, however, that "although a decree in express terms purports to affirm a particular fact, or rule of law, yet if such fact or rule of law was immaterial to the issue, and the controversy did not turn upon it, the decree will not conclude the parties thereto." (*Woodgate v. Fleet*, 44 N. Y. 1, 13; *Stannard v. Hubbell*, 123 N. Y. 520; *House*

v. *Lockwood*, 137 N. Y. 259; *Reynolds v. Stockton*, 140 U. S. 254; *Packet Co. v. Sickles*, 5 Wall. 592; *Jackson v. Wood*, 3 Wend. 37, and *Wood v. Jackson*, 8 Wend. 10; *Sweet v. Tuttle*, 14 N. Y. 465; *Campbell v. Consalus*, 25 N. Y. 613; *People ex rel. Reilly v. Johnson*, 38 N. Y. 63; *Hymes v. Estey*, 116 N. Y. 501, 509; *Lorillarā v. Clyde*, 122 N. Y. 41; Bigelow on Estoppel, 152; *Duchess of Kingston's Case*, Everest & Strode, 410.) Lord Chief Justice DeGRAY said in the case last cited: "That neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within the jurisdiction, or of any matter incidentally cognizable, or of any matter to be inferred by argument from the judgment."

It is, therefore, necessary to determine the precise issues framed by the pleadings and tried in the equity suit. Edward in beginning the suit had mistaken his remedy and was turned over to a court of law. When this case was called for trial Edward moved to dismiss his own complaint, but William insisted on taking the affirmative and trying the issues under his counterclaim and the reply thereto. This right was accorded him by the court and the trial proceeded on these issues.

William set up a counterclaim as follows, repeating all the facts that he had pleaded in detail in his answer: "At all times since the making, execution and delivery of said contract, dated August 18th, 1891, defendant has been and is now entitled to have deposited with him by plaintiff the whole of said bonds of said Hoffman House to the par value of \$150,000, to be held by defendant as security pursuant to the terms and provisions of said agreement dated August 18th, 1891. That plaintiff has neglected and refused and still neglects and refuses to make such deposit with defendant of \$25,000, in amount, of bonds, although frequently requested to do so; to the wrong, injury and damage of defendant. Wherefore defendant prays judgment against plaintiff as follows: (1) That the complaint be dismissed with costs. (2) That it be adjudged that plaintiff was not, at the commence-

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

ment of this action, entitled to the temporary injunction granted herein. (3) That plaintiff be required to deliver to and deposit with defendant additional bonds of the Hoffman House to the par value of \$25,000, or the value thereof in cash, *to be held by defendant pursuant to the agreement of August 18th, 1891.* (4) That the defendant may have such other or further relief," etc.

Edward served a reply to the counterclaim, in which he denied the allegations thereof, to the effect that defendant was entitled to have deposited with him \$150,000 in bonds of the Hoffman House under the agreement of August 18th, 1891. He admitted that he had refused and still refuses to make a further deposit of \$25,000 of bonds of the Hoffman House corporation with the defendant, and that he had not made such deposit. He then alleges as follows: "Further replying to said counterclaim the plaintiff alleges that subsequent to the execution and delivery of the said contract the defendant purchased from Cassius H. Read, referred to therein, 500 shares of common stock, part of the 1,963 shares of said stock referred to in paragraph seventhly of said agreement, and that after making such purchase (the plaintiff requested the defendant to purchase the remainder of the stock of said Read which he refused to do) and applied to the plaintiff to be relieved from the further performance of said contract." The reply then sets up in detail the matter of the West Virginia lands and alleges that the parties to the contract of August 18th, 1891, had abandoned the same. The reply then closes as follows: "Further replying to said counterclaim, and for a further and separate defense thereto, the plaintiff alleges that the construction asked by the defendant to be placed upon said contract of August 18th, 1891, is inequitable, and that the terms and conditions thereof are so indefinite, uncertain and oppressive that it would be inequitable to enforce the same." The reply then demands judgment dismissing the counterclaim and granting the relief prayed in the complaint.

The reply of Edward, most favorably construed as to him,

interposes two defenses: (1) That by an agreement made after the contract of August 18th, 1891, the parties thereto covenanted that said agreement should be abandoned. (2) That the claim of the defendant that plaintiff be compelled to specifically perform the contract of August 18th, 1891, by depositing the additional 25 Hoffman House bonds was, in view of the circumstances under which the contract was made, inequitable, oppressive and unjust.

As we have already pointed out, the plain reading of the contract that \$150,000 of Hoffman House bonds *had* been deposited at the time of its execution, made the remaining 25 bonds deliverable at once on the signing of the contract; but if we assume it was open to the court to consider the effect of William's failure to purchase all of Read's stock, the only question before it was whether, this fact being proved, William was entitled to specific performance. This was merely an appeal to the discretion of the court. The question before the court may be thus stated: Is it equitable to require the plaintiff to deposit with defendant the additional 25 bonds, the latter having failed to acquire all of Read's stock by reason of his refusal to sell, it being immaterial in the present suit whether the failure to purchase was due to inability to perform a positive or conditional contract obligation?

The pleadings in the equity suit did not involve the general consideration of the agreement of August 18th, 1891. The question as to whether it was obligatory upon William to purchase all of Read's stock was not presented to the court, and the fact that the trial judge saw fit to pass upon that point renders the provisions of the decree in that regard mere surplusage and of no binding force or effect.

There is no doubt as to the general rule that a judgment of a court of competent jurisdiction is final and conclusive upon the parties, not only as to the issues actually determined, but as to every other question which the parties might or ought to have litigated. (*Embury v. Conner*, 3 N. Y. 511, 522; *White v. Coatsworth*, 6 N. Y. 137, 139; *Pray v. Hegeman*, 98 N. Y. 351, 358; *Jordan v. Van Epps*, 85 N. Y. 427, 437;

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

Smith v. Smith, 79 N. Y. 634; *Clemens v. Clemens*, 37 N. Y. 74; *Lorillard v. Clyde*, 122 N. Y. 41; *Reich v. Cochran*, 151 N. Y. 122, 127.) In other words, all the issues that were necessarily involved.

When this case was here before, Judge MARTIN, writing one of the prevailing opinions at that time, said (155 N. Y. 581, 589): "It is apparent that the case of *Stokes v. Stokes* (148 N. Y. 708) cannot be given the effect claimed for it by the present appellant, and accorded to it in the opinions which favor a reversal. The only question actually involved in that case was whether, under the circumstances proved, specific performance ought to be decreed. It arose upon the then defendant's counterclaim, by which he sought to compel the plaintiff in that action to specifically perform the contract of August 18th, by depositing \$25,000 of bonds, in addition to the \$155,000 already deposited with him. It was understood by the parties when they entered into that contract that William could probably purchase from Read his stock which consisted of 1,963 shares. That he was unable to do. He was thus relieved from the investment of a large amount of money which would have been required for the purpose if he had been able to make the contemplated purchase. That the securities which he held were abundantly sufficient to indemnify him against any liability, actual or contingent, which then existed by reason of that contract, was obvious. Under those circumstances this court held that specific performance ought not to be decreed, and that the General Term erred in reversing the judgment of the Special Term, which dismissed both the plaintiff's complaint and the defendant's counterclaim. Obviously, this was upon the ground that the liability of William was less than was originally contemplated, and, hence, did not require the deposit of any additional security to completely indemnify him. Under the circumstances the discretion which rests in a court of equity in determining whether specific performance shall be granted or withheld, plainly authorized the court to refuse the decree sought. The right of specific performance rests in the judicial discretion of the

court, and may be granted or withheld upon a consideration of all the circumstances and in the exercise of such discretion. * * * Whether the securities already in the possession of William might be held by him as security for the liabilities mentioned in the agreement, was not at all material, or in any way necessary to the determination of that issue. It was not a relevant or necessary fact to be decided in that case. The decision of the court was only to the effect that as William was abundantly secured against loss by reason of any liability of Edward, direct or contingent, it would be inequitable to compel the latter to deposit the additional security provided for by the contract, and, hence, the court would not accord to him the peculiar relief of specific performance, but leave the parties to their legal remedy. Hence it follows that the question whether William is entitled to hold the bonds in his possession as collateral security for the performance of the provisions of the contract is an open one and not controlled by the decision in that case."

As to the issue in the equity suit, that the contract of August 18th, 1891, had been abandoned, it is sufficient to say that the court expressly found as follows: "Since the making, execution and delivery of said contract, or agreement, the parties thereto have not agreed to abandon the same, or to modify it in any respect, and it has not been abandoned."

Third, as to the proposition that certain questions should have been submitted to the jury. The judgment in the equity suit was entered at the Trial Term on the 5th day of September, 1893, and speaks as of that date. It is not disclosed by this record that there were any negotiations between the parties looking to the abandonment of the contract of August 18th, 1891, after that time. The abrogation of the contract was one of the issues clearly presented to the court in the equity suit and its determination is final so far as the defendant is concerned. This action was begun in October, 1892, and it is not disclosed that there were negotiations between these parties after that time as to any transactions in this case.

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

The equity judgment adjudges among other things that William failed to purchase Read's stock because the latter refused to sell; this notwithstanding Edward's allegation in his pleading that William refused to purchase any more of Read's stock than the 500 shares.

The question whether there was a breach of the contract by the failure to purchase all of Read's stock, even if it had been before the court, is a pure question of law, calling for the construction of the contract of August 18th, 1891.

The question as to the alleged absolute conveyance of certain West Virginia lands by Read to William is of no importance in this litigation. It is an open question whether a portion of the lands described in the deed, and the agreement accompanying the same, were taken as security or an absolute transfer. Construing them, for argument's sake, as amounting to an absolute conveyance of the property and the discharge of Read from his obligation to pay his two notes of \$10,000 and \$15,000, respectively, it only goes to reduce the amount of indebtedness for which William holds the 125 Hoffman House bonds. The same is true of the alleged failure to charge Edward as an indorser on the Read note for \$10,000.

As we are of opinion that the construction of the agreement of August 18th, 1891, is an open one in this court; that the 125 bonds are held as collateral security for the performance of the guaranties of William, assumed or created by the contract in question, and also for the other indebtedness referred to in the sixth subdivision of the agreement, as well as against any foreclosure of the Hoffman House mortgage, the same having taken place according to the record, it follows that the 125 bonds are held for purposes other than as collateral security for the payment of the notes in suit, and that there was no question to submit to the jury. This being so, it follows that the trial judge was justified in directing a verdict for the plaintiff.

The order of the Appellate Division sustaining the exceptions taken at the trial and directing a new trial should be

reversed and an order should be granted directing that a judgment be entered upon the verdict directed at the trial, with costs in all the courts.

O'BRIEN, HAIGHT, MARTIN and VANN, JJ., concur; PARKER, Ch. J., and GRAY, J., dissent.

Ordered accordingly.

HOFFMAN HOUSE, NEW YORK, as Trustee, Appellant, v. ELIZER V. FOOTE, as Executor of EDWARD S. STOKES, Deceased, Respondent.

1. APPEAL — NONSUIT — PRESUMPTION. On appeal from a judgment dismissing the complaint at the close of the plaintiff's opening address, every material fact in issue will be resolved or found in his favor.

2. TRUSTS — CORPORATION — PLEDGE. A corporation to which property has been assigned as a pledge for its own protection and indemnity, and the protection and indemnity of others who became the assignor's sureties on the faith of the pledge, may, as a trustee of an express trust, maintain a suit to reclaim the property pledged from the assignor, who had appropriated it to his own use, provided any of the obligations for the security and benefit of which the pledge was made remain undischarged.

3. PRINCIPAL AND SURETY — INDEMNITY — CONSTRUCTION. Under a written assignment of a judgment pledging the sums collected thereon for the protection and security of a specified principal and sureties upon a bond executed for the assignor, clauses providing for the application of the moneys collected "for the purposes above mentioned" and for the benefit of the sureties "as their interest may appear at the time," contemplate the protection and indemnity of all the sureties on the bond, and not merely of that one of them described as principal.

Hoffman House v. Stokes, 50 App. Div. 163, reversed.

(Argued October 9, 1902; decided November 11, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 4, 1900, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

David McClure for appellant. The instrument of March 18, 1895, and the payment of the money in accordance therewith to the plaintiff constituted the plaintiff trustee. (*Morse v. Morse*, 85 N. Y. 53; *Gilman v. McArdle*, 99 N. Y. 451; *Day v. Roth*, 18 N. Y. 448; *Matter of Carpenter*, 131 N. Y. 86; *Woodward v. James*, 115 N. Y. 346; *Gillet v. Bank of America*, 160 N. Y. 549; *Simpson v. J. C. C. Co.*, 47 App. Div. 17; *Kane v. Bloodgood*, 7 Johns. Ch. 90; *Clafin v. Maglaughlin*, 65 Penn. St. 492; *Leitch v. Hollister*, 4 N. Y. 211.) There is an outstanding trust which entitles the Hoffman House, as trustee, to maintain the present action. (*Wetmore v. Porter*, 92 N. Y. 76; *Zimmerman v. Kinkle*, 108 N. Y. 282; *Gillet v. Bank of America*, 160 N. Y. 549; *White v. Hoyt*, 73 N. Y. 505; *Hoffman v. Æ. F. Ins. Co.*, 32 N. Y. 405.)

Charles E. Hughes for respondent. The plaintiff has not a good cause of action in its alleged representative capacity as trustee. (*F. Nat. Bank v. Shuler*, 153 N. Y. 172; *Austin v. Munro*, 47 N. Y. 360; *O'Brien v. Jackson*, 167 N. Y. 31; *Collins v. Hydorn*, 135 N. Y. 320; *Beers v. Shannon*, 73 N. Y. 292, 297; *McCull v. Fraser*, 40 Hun, 114; *Mowry v. Hawkins*, 57 Conn. 453; *Stokes v. Reilly*, 121 Ill. 166; *Payne v. Rogers*, Douglas, 407; *Legh v. Legh*, 1 B. & P. 447.) The assignment of the Mackay judgment did not create a trust in the plaintiff, but was a direct conveyance to the three assignees by way of security, as stated. (*Leitch v. Hollister*, 4 N. Y. 211; *Dunham v. Whitehead*, 21 N. Y. 131; *Brown v. Guthrie*, 110 N. Y. 440; *Maass v. Falk*, 24 N. Y. Supp. 448; 146 N. Y. 34; *Boessneck v. Cowen*, 7 N. Y. Supp. 620; *Clafin v. Maglaughlin*, 65 Penn. St. 492.) If the plaintiff ever became trustee, the trust it assumed has been discharged, and it is not now entitled to prosecute any claim in its alleged representative capacity. (*Turk v. Ridge*, 41 N. Y. 201; *N. Y. S. Bank v. Fletcher*, 5 Wend. 85.)

O'BRIEN, J. The plaintiff's complaint was dismissed at the trial, and this appeal is from the affirmance of that judgment.

It seems to us that the judgment rests upon grounds so narrow and technical that the appeal should be sustained and the parties remitted to a trial of the case in the regular and ordinary way.

The issues in the case, if any, were triable by jury; but, after the plaintiff's counsel had opened the case to the jury, the learned trial judge granted a motion made by the defense for the dismissal of the complaint, and so the complaint was dismissed from what appears upon the face of the pleadings or was stated by counsel in opening the case to the jury. The record contains the pleadings, the opening address of plaintiff's counsel, the motion to dismiss, with much argument thereon by counsel on both sides, and concludes with the statement that the complaint was dismissed at the close of the opening, to which decision the plaintiff's counsel excepted. In substance this exception raises the question whether the court could properly nonsuit the plaintiff upon the pleadings and opening without further investigation of the facts bearing upon the merits of the controversy. When a defendant demands and procures such a ruling at the trial he must be prepared to defend it in this court upon the assumption that every material fact in issue is to be resolved or found in favor of the plaintiff.

The judgment in this case cannot be sustained without adopting some one of three possible theories incumbent upon the defendant to clearly establish. If it can be demonstrated either (1) that the complaint does not state a cause of action or (2) that a cause of action well stated is conclusively defeated by something interposed by way of defense and clearly admitted as a fact, or (3) that the learned counsel for the plaintiff, in his opening address, by some admission or statement of facts, so completely ruined his case that the court was justified in granting a nonsuit, then this judgment ought to be sustained; but not otherwise. The practice of disposing of cases upon the mere opening of counsel is generally a very unsafe method of deciding controversies, where there is or ever was anything to decide. It cannot be resorted to in

many cases with justice to the parties, unless the counsel stating the case to the jury deliberately and intentionally states or admits some fact that, in any view of the case, is fatal to the action.

I am unable to find anything of that kind in the opening address contained in this record. It might very well be held that the learned counsel in the opening enlarged or amplified the complaint, but it cannot be said that his claim was not at least as broad as his complaint, or that his case verbally stated to the jury was not as strong as presented by pleading. If the plaintiff's counsel had a case upon the pleadings, it cannot be said that he stated himself out of court in his opening to the jury.

The real question is whether he had any case upon the pleadings. The nonsuit rests upon the proposition that the plaintiff sued as trustee and had not stated any facts to justify a recovery in that capacity. The basis of the complaint is a written instrument which is set out in full, whereby the defendant assigned to the plaintiff and three other parties a judgment which he then held against Mackey of nearly one hundred thousand dollars. The purpose of the assignment was declared by the instrument to be for the purpose of securing the payment of a loan made to the defendant by one of the assignees, and of indemnifying the assignees from all loss or liability by reason of certain bonds or obligations which they had executed for the defendant and at his request, in litigations to which the defendant was a party, to enable him to appeal in one case and to get the benefit of a judgment and sale upon foreclosure in another case. The judgment was assigned as a pledge to secure the loan and to indemnify the defendant's sureties upon these bonds, and the money when collected was to be retained and applied by the plaintiff upon any of these obligations in case of default in payment, or in case the sureties or any of them were made liable thereon, or in case any of the contingencies happened against which the sureties were to be indemnified by the terms of the instrument declaring the purposes of the pledge. Although the assignment ran to

the plaintiff and the two other parties severally as security or indemnity against the several and separate obligations which they had severally assumed for the defendant and for the loan by one of them, yet the judgment was to be collected and received by the plaintiff alone and held or used by it for the purposes described, and the surplus, if any, was then to be paid over to the defendant. The judgment was collected by the plaintiff, and, having received the money, it was entered as a special account upon its books. Subsequently the defendant, having control of the plaintiff's corporate action, withdrew the fund from the special account and applied the same to his individual and private uses. It is obvious that the money collected on this judgment was not received or held by the plaintiff in its own right or in its simple private corporate capacity, but for a special and particular purpose, namely, the protection of the sureties on the bonds and the payment of the loan. That was the sole purpose for which the fund was created, and if a natural person should receive money under like circumstances and for a similar purpose it would not, I think, be an error of law to hold that he was a trustee and was liable to respond for the fund in a fiduciary or representative capacity. In the character of a trustee he could protect the fund from spoliation by any wrongdoer.

The plaintiff brought this action to reclaim and restore the fund, not only for its own benefit as one of the sureties, but for the benefit of others who were co-sureties with it and interested in the protection of the fund. A party, though a corporation, may prosecute an action for the benefit of others, and when it does it is a trustee of an express trust, within the provisions of the Code. (Code Civ. Proc., § 449.) The plaintiff received and held the fund as trustee for its own protection as surety for the defendant and also for the protection of the other sureties on the bonds and to pay a certain loan, and as to the surplus it was a trustee for the defendant.

But it is said that this situation has been changed by events that transpired after the assignment of the judgment and after the collection and receipt of the money thereon by the

plaintiff. It is conceded that two of the obligations, to secure which the fund was created by the assignment from the defendant, have ceased to exist, since one of the bonds has been discharged by a direction of the court for a new trial of the action and the loan has been paid in full. The third obligation, however, still remains in full force, and the question is whether the plaintiff may not assert its right to the possession of the fund in the same character or capacity in which it was originally received, so long as any of the obligations for the security and benefit of which it was created remain undischarged. The outstanding obligation is somewhat peculiar. It is executed by the plaintiff corporation as principal and two individual sureties. It may be conceded that the latter are not liable on it until after default of the former, though that is by no means clear, since all were sureties as to the plaintiff in the bond, but the fact still remains that the pledge of the judgment, according to the fair scope and meaning of the instrument creating the pledge, was intended to indemnify the parties to that bond from all loss and it is still an existing valid obligation upon which the sureties may be made liable. It may very well be that the individual sureties executed the bond with the plaintiff upon the faith and credit of this fund and they have the right to object to its waste and depletion by the trustee or any one else and may call upon the trustee to protect it from diversion to the private use of the defendant. So that whatever relation the plaintiff held to this fund, when it received it, that relation has not been changed but still exists.

One of the defenses set up in the answer was that the defendant has been released and discharged from all liability to account for the fund abstracted from the plaintiff's custody. That, of course, must mean that the defendant has a release and discharge from the plaintiff in the same character and capacity in which it sues, and it is said that this defense is admitted upon the record, since it is not put in issue by the reply. If the plaintiff's counsel, after stating a good cause of action in his complaint, has admitted upon the record that the

defendant has been released and discharged, of course he was properly nonsuited; but that does not seem to me to be the situation. If the defendant by his control of the corporate action of the plaintiff was enabled to procure a resolution to be passed, or a release to be executed, surrendering the pledge, or discharging him from liability for the conversion of the money, that would not affect the parties for whose benefit the trust was created, unless they consented to it. The special defense states nothing with respect to the release except a simple corporate act to which the beneficiaries of the trust were not parties. It alleges that on a certain day mutual releases passed between the parties, but the pleading does not, in terms, state that either party released any claim held as trustee or for the benefit of others. The plaintiff, by way of reply to this defense, denied that any such release or discharge was ever made, adding to the broad terms of the denial the following qualifying words, "*if the defendant by said allegation intends to charge that thereby claims, demands and causes of action of the plaintiff as trustee, against the defendant, were cancelled or discharged.*" These were unnecessary or redundant words, but they did not vitiate the pleading at the trial. They would probably have been stricken out on a motion to correct it, but a demurrer to such a pleading cannot prevail, and the motion for a nonsuit, so far as it related to the pleadings, must be treated as a demurrer interposed at the trial. So there was a clear issue of fact on the face of the pleadings with respect to the release, and there is nothing in the opening of counsel that helps the defendant upon that issue.

The case, when viewed broadly in the light of the pleadings and the proceedings at the trial, comes to this: The plaintiff received certain property from the defendant, under a written instrument which required it to hold the same for certain specified purposes, that is to say, for its own protection and indemnity and the protection and indemnity of others who became defendant's sureties on the faith of the pledge. While one of these surety bonds was outstanding and undis-

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

charged the defendant, as the plaintiff's agent or president, appropriated the fund to his own use. In a suit by the plaintiff to reclaim the fund it has been nonsuited on the sole ground that it sued as trustee, and in that character had stated no cause of action. Whatever may appear to be the real merits of this case when regularly tried and submitted, we think this ruling was erroneous. It is not necessary to use any particular formula of words in order to create a trust of personal property, and it is not even necessary that such a trust should be evidenced by any writing. Trust relations will be implied when it appears that such was the intention of the parties and when the nature of the transaction is such as to justify or require it. (*Morse v. Morse*, 85 N. Y. 53; *Gilman v. McArdle*, 99 N. Y. 451; *Day v. Roth*, 18 N. Y. 448; *Matter of Carpenter*, 131 N. Y. 86; *Woodward v. James*, 115 N. Y. 346; *Gillet v. Bank of America*, 160 N. Y. 549.) It is quite clear that the contract, which is the basis of the action, was made, not for the benefit of the plaintiff alone, but for the benefit of others as well, including the defendant, who was entitled to the surplus. The plaintiff did not cease to be a trustee when one of the bonds was discharged and the loan for which the pledge was made in part had been paid. So long as the other bond remained unsatisfied the plaintiff's duties and obligations and its legal relations to the fund and the parties remained unchanged, and what they were originally. While the plaintiff is described as the principal in that bond, the terms of the writing are broad enough to give the individual sureties an interest in the collateral and the right to protect it. It is not true, we think, that at the time of the commencement of the action the plaintiff could hold the fund only in its own right and for its own protection. That contention ignores the manifest purpose of the pledge expressed or implied in the writing to secure and indemnify *all* the sureties on the bond and not merely one of them who was described as principal.

If there could be any doubt about this proposition, founded upon the general words of the written assignment, it is

removed by the very last clause, which in terms provides that the plaintiff is to apply the moneys collected on the judgment "for the purposes above mentioned," and for the benefit of the sureties (naming them) "as their interest may appear at the time." These words plainly mean that the pledge was not merely for the benefit of one of the sureties on the outstanding bond designated therein as "principal," but for the benefit of all, as their interest might appear.

The defendant had no right to the fund so long as any of the sureties on that bond remained liable. The sureties all executed the bond with knowledge of the pledge of the fund in question and presumptively on the faith of it and had the right to object to any release of it by the plaintiff. (*Wetmore v. Porter*, 92 N. Y. 76.) It may be that there is a defense to this action when all the numerous allegations contained in the voluminous pleadings, on both sides, have been tried and decided; but it is quite clear, we think, that the defendant was not entitled to a nonsuit by reason of anything stated in the pleadings, or admitted in the opening of counsel.

The judgment should be reversed and a new trial granted, costs to abide the event.

CULLEN, J. (dissenting). There are two questions presented on this appeal and both arise on the pleadings. The first is whether the complaint set forth a good cause of action against the defendant, the second whether that cause of action had been released previous to the institution of the suit. If either of these questions was decided against the plaintiff it would have been unreasonable for the trial court to proceed with the trial, for in such event there could be nothing to try.

The complaint was dismissed at Trial Term on the ground that the plaintiff sued as trustee, while the cause of action set forth in the complaint was in favor of the plaintiff individually. The Appellate Division by a divided court has on this theory affirmed the action of the Trial Term. In this view I do not concur. It is true the title of the summons and that

N. Y. Rep.]

Dissenting opinion, per CULLEN, J.

of the complaint state the name of the plaintiff as "Hoffman House, New York, as Trustee," but as trustee for whom or for what is not stated. The complaint sets forth the instrument under which the judgment recovered by the defendant against Mackey and others was assigned to the plaintiff; it states the collection of the judgment by the plaintiff and the subsequent appropriation of the fund by the defendant, who was at the time an officer of the plaintiff and in control of its management, and it prays judgment that the defendant pay "to the plaintiff Hoffman House, New York," the sum of thirty-five thousand dollars with interest, being the amount for which the plaintiff was liable on a bond which it had previously given. Thus the complaint stated all the facts, and if from those facts there arose a good cause of action in favor of the plaintiff individually it was entitled to recover in its own right, despite its description as trustee in the title of the summons and complaint. (*Litchfield v. Flint*, 104 N. Y. 543; see cases there cited.) This would seem to have been the notion of the pleader who drew the answer, for in that answer there are alleged both a personal release from the plaintiff and a counterclaim against the plaintiff individually. That the complaint stated a good cause of action in favor of the plaintiff either in one capacity or the other cannot be questioned.

To the allegation of the release the plaintiff replied by denying that it thereby discharged the defendant from any cause of action which it as trustee had against him, and it also set up in bar of the defendant's counterclaim the same settlement, alleging that thereby the plaintiff released the defendant from all causes of action against him in favor of the plaintiff in its individual capacity, and that in consideration thereof the plaintiff was discharged from all liability to the defendant. It is, therefore, clear that by the pleadings it appeared that all personal claims or demands against the defendant had been discharged, and there remains the sole question whether the claim of the plaintiff to a portion of the proceeds of the assigned judgment was in its own right or for

the benefit of others. It seems to me unnecessary to consider whether by the instrument of assignment the plaintiff was created a trustee or not. The first and third of the liabilities as indemnity against which the Mackey judgment was assigned had been discharged by the defendant. He had succeeded in setting aside the judgment for which McDonald and Leary were sureties on appeal. He had paid Leary the debt of twenty-five thousand dollars specified in the assignment. The only purpose still outstanding was the second: "To secure the said Hoffman House against any liability heretofore incurred or which it may be under by reason of its being a surety or liable in a proceeding in which the Farmers' Loan & Trust Company, as trustee, was plaintiff, and the Hoffman House of New Jersey was defendant, which obligation was for about thirty-five thousand dollars (\$35,000), originally." It is the sum of money requisite to discharge this obligation and only this sum that the plaintiff seeks to recover. If this obligation inured to the benefit of the plaintiff alone, it is plain that the claim against the defendant for the conversion of the fund was the personal claim of the plaintiff, and it is admitted that all such claims held by either party to the action against the other were released and discharged by the settlement of September 25th, 1897. If a recovery is had in this action and the money applied to the satisfaction of the bond it will inure directly to the advantage of plaintiff, who will obtain thirty-five thousand dollars from the defendant, although the parties agreed to release their several demands. The theory on which such result is sought to be accomplished is that the plaintiff is a trustee, not only for itself, but for the persons who became sureties on the bond it gave in regard to the liabilities specified in the assignment. That a party cannot well be trustee for himself is settled by the decision of this court in *Greene v. Greene* (125 N. Y. 506). Though if the contrary were the law I do not see how it would affect the question. So far as the plaintiff was a beneficiary under the assignment, even if the assignment had been made to another as trustee, it could release the defendant from any conversion

of the trust fund; and if the plaintiff was the sole beneficiary its release would be a bar to any action by the trustee. The controversy, therefore, becomes further narrowed to the single question whether the assignment was for the benefit of the sureties of the plaintiff and created a trust in their favor. It would seem that even a casual reading of the instrument disposes of such a contention. The purpose of the assignment is said to be "to secure the said Hoffman House against any liability." It is not stated to be for the purpose of indemnifying the sureties. There is no reference to the sureties, nor does it appear from the instrument that there were any such sureties. The final clause of the assignment does not in any way extend or amplify the objects before specified. The learned prevailing opinion is erroneous where it is stated that the assignment provides that the plaintiff is to apply the moneys collected on the judgment "for the benefit of the sureties (naming them) 'as their interest may appear.'" The provision is that the moneys shall be applied "for the benefit of the said Ronald T. McDonald, the Hoffman House and James D. Leary as their interest may appear at the time." McDonald was not a surety on the bond given by the plaintiff. James D. Leary was one of such sureties, and Daniel J. Leary was the other, but the name of the latter nowhere appears in the assignment. If it was the intention, by this clause, to indemnify the plaintiff's sureties, why was not Daniel J. Leary mentioned as well as James D. Leary, and why was McDonald mentioned at all? The specification of McDonald, the Hoffman House and Leary was, however, entirely accurate on the assumption that the assignment was intended to secure only the parties named in it against the liabilities therein specified, for McDonald and James D. Leary were the sureties on the appeal bond, the Hoffman House was principal on the bond given in the foreclosure suit and James D. Leary was a creditor of the defendant for the sum of twenty-five thousand dollars. There is this further suggestion to be made: If the plaintiff recovers this claim as trustee for its sureties, will that relieve the plaintiff from its primary obliga-

tion to pay its own bond, or if the recovery is applied toward the satisfaction of that bond in exoneration of the sureties, will the defendant be subrogated to the claim of those sureties against the plaintiff?

The judgment appealed from should be affirmed, with costs.

BARTLETT, HAIGHT and VANN, JJ., concur with O'BRIEN, J.; PARKER, Ch. J., and WERNER, J., concur with CULLEN, J.

Judgment reversed, etc.

In the Matter of the Probate of the Will of ROBERT E. HOPKINS, Deceased.

ROBERT E. HOPKINS, JR., Appellant; FANNY W. HOPKINS et al., Respondents.

EVIDENCE—HANDWRITING—TESTIMONY OF AN EXPERT AS TO IDENTITY OF PERSON MAKING MARKS CANCELING SIGNATURE TO A WILL, INADMISSIBLE—MARKS NOT “WRITINGS” WITHIN MEANING OF STATUTES PERMITTING COMPARISON OF HANDWRITING BY EXPERTS. When the only question of fact presented for the determination of the court upon the probate of a will is whether the testator's signature thereto was canceled by him, with the intention of revoking his will, by fourteen nearly perpendicular marks drawn across the letters of his signature, the testimony of an expert in inks and handwriting, that, judging from the signatures of the testator appearing on the will, such marks were not made by the same person who wrote the signature to the will, is inadmissible, since such marks are not “writings” within the meaning of the statutes (L. 1810, ch. 36, amd. L. 1888, ch. 555) which permit the comparison of writings by experts, and mere marks or scratches, used either perpendicularly or horizontally over a signature for the purpose of canceling it, do not contain the characteristics necessary in the formation of letters to enable an expert, or any person, to speak with any degree of certainty with reference to the identity of the person who made the marks.

Matter of Hopkins, 73 App. Div. 559, reversed.

(Argued October 8, 1902; decided November 11, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 6, 1902, which affirmed a decree of the Westchester

N. Y. Rep.]

Statement of case.

County Surrogate's Court admitting to probate a paper writing propounded as the last will and testament of Robert E. Hopkins, deceased.

The facts, so far as material, are stated in the opinion.

Joseph W. Middlebrook for appellant. The testimony of the witness *Carvalho* should have been excluded, being altogether incompetent, and the witness himself being unqualified. (*Dougherty v. Milliken*, 163 N. Y. 527; *People v. Molineux*, 168 N. Y. 264; *Clason v. Bailey*, 14 Johns. 483; Taylor on Ev. § 1877; *Matter of Taylor*, 10 Abb. Pr. [N. S.] 300; *Taylor v. Crowinshield*, 5 N. Y. Leg. Obs. 224; *Sarvent v. Hesdra*, 5 Redf. 47; *Green v. Terwilliger*, 56 Fed. Rep. 384; *Winans v. N. Y. & E. R. R. Co.*, 21 How. [U. S.] 101; *Roberts v. N. Y. E. R. R. Co.*, 128 N. Y. 455.) The presumption was that the cancellation was done by Robert E. Hopkins, the testator, and it was necessary that that presumption be either repelled or rebutted. (*Dan v. Brown*, 4 Cow. 483; *Bigelow v. Gillott*, 123 Mass. 102; *Woodfill v. Patten*, 76 Ind. 575; *Estate of Tomlinson*, 133 Penn. St. 245; *Evans' Appeal*, 58 Penn. St. 238; *Townsend v. Howard*, 86 Me. 285; *Matter of Olmstead*, 122 Cal. 224; *Lambell v. Lambell*, 3 Hagg. Eccl. Rep. 568; *Bigge v. Bigge*, 3 Notes of Cases, 605; *Matter of Cooke*, 5 Notes of Cases, 390; *Avery v. Pixley*, 4 Mass. 460.) Every presumption was against the theory of cancellation by any person other than testator, and such theory could be maintained only by positive proof. (*Hard v. Ashley*, 88 Hun, 107; *Timon v. Claffy*, 45 Barb. 438; *Ricketts v. Mumford*, 2 Phil. 23; *Moore v. De Laterre*, 1 Phil. 375; *Shultz v. Hoagland*, 85 N. Y. 464; *Morris v. Talcott*, 96 N. Y. 100; *People ex rel. v. Barker*, 141 N. Y. 251; *Bernheimer v. Rindskopf*, 116 N. Y. 428; *O'Gara v. Eisenlohr*, 38 N. Y. 297; *McIntyre v. Buell*, 132 N. Y. 192.)

Clarence S. Davison for Fanny W. Hopkins, respondent. The testimony produced before the court overwhelmingly

outweighs the presumption that testator canceled his signature *animo revocandi*, and justifies the probate. (*Grier v. P. C. Co.*, 128 Penn. St. 98; *Matter of Clark*, 1 Tucker, 445; *Matter of Philp*, 46 N. Y. S. R. 356; *Matter of Brockman*, 67 N. Y. S. R. 297; *William v. Tyley*, 1 Johns. Ch. 530; *Townshend v. Howard*, 86 Me. 285; *Woodfill v. Patton*, 76 Ind. 575; *Matter of Olmstead*, 122 Cal. 224.) The expert testimony of the witness Carvalho was properly admitted. (*Lansing v. Russell*, 3 Barb. Ch. 325; *Kowling v. Manly*, 49 N. Y. 192; *Jackson v. Van Dusen*, 5 Johns. 144; *Jackson v. Jackson*, 39 N. Y. 159; *Comm. v. Webster*, 5 Cush. 301; *Comm. v. Nefus*, 135 Mass. 533; *Lyman v. Lyman*, 9 Conn. 55; *Gervais v. Baird*, 2 Brev. 37; *Paisley v. Snipes*, 2 Brev. 200; *Strong v. Brewer*, 17 Ala. 706.)

James MacGregor Smith for American Board of Commissioners for Foreign Missions et al., respondents. There was no error committed in receiving the testimony of Mr. Carvalho, the handwriting expert. (*People v. Molineux*, 168 N. Y. 264; *Titford v. Knott*, 2 Johns. Cas. 210; *Jackson v. Van Dusen*, 5 Johns. 144; *Miles v. Loomis*, 75 N. Y. 288; *McKay v. Lasher*, 42 Hun, 270; *Dresler v. Hard*, 127 N. Y. 235; *Lansing v. Russell*, 3 Barb. Ch. 325.)

Ernest I. Edgcomb for Poinpey Congregational Church et al., respondents. The marks in question do not of themselves constitute a revocation of the will. (*Jackson v. Holloway*, 7 Johns. 394; *Dan v. Brown*, 4 Cow. 483.) No error was committed in admitting the evidence of the witness Carvalho. (*Berkley v. Thomas*, Plowd. 118; *Lawson on Expert Ev.* [2d ed.] 350; *State v. Tice*, 3 Oreg. 457; *Strong v. Brewer*, 17 Ala. 706; *George v. Surrey, M. & M.* 516; *Lansing v. Russell*, 3 Barb. Ch. 325.)

HAIGHT, J. Robert E. Hopkins died at Tarrytown in this state on the 9th day of May, 1901. He was possessed of a large estate, and left him surviving Fanny W. Hopkins, his widow, and Robert E. Hopkins, Jr., his son, of the age of thir-

N. Y. Rep.]

Opinion of the Court, per HAIGHT, J.

teen years, his only heirs at law and next of kin. He in company with other gentlemen organized the Tide Water Oil Co. and the Tide Water Pipe Co., and the greater portion of his time was occupied in attending to the business of those companies. His desk and office was in a room of the building in the city of New York in which the business of the companies was chiefly transacted. He had two safe deposit vaults, one in the city of New York and the other at Tarrytown, and it was his custom to keep his valuable papers in one of those vaults. After his death a search was made for his will. It was not found in either of the safe deposit vaults, but the paper now propounded as his will was finally found the second or third day after his funeral in a little drawer under his roller-top desk in his office. When found his signature was canceled by fourteen nearly perpendicular marks with pen and ink drawn across the letters of his signature. The paper is dated the 14th day of November, 1891, and undoubtedly it was executed as his last will and testament at that date. And the only question of fact presented for the determination of the court is as to whether his signature thereto was canceled by him with the intention of revoking the will.

The finding of the will in the testator's desk with his signature canceled raised the presumption that the cancellation was done by him with the intention of revoking it. Williams on Executors (Vol. I, page 85) says: "If a testament was in the custody of the testator, and upon his death it is found among his repositories canceled or defaced, the testator himself is to be presumed to have done the act; and the law presumed that he did it *animo revocandi*." In Redfield on Wills (p. 307) it is said: "The rule of evidence in the ecclesiastical courts, in regard to the presumptive revocations, from the absence or mutilation of the will, seems to be, that if the will is traced into the testator's possession or custody, and is there found mutilated in any of the modes pointed out in the statute for revocation, or is not found at all, it will be presumed the testator destroyed or mutilated it, *animo*

revocandi; but if it was last in the custody of another, it is incumbent upon the party asserting revocation, to show the will again in the testator's custody, or that it was destroyed or mutilated by his direction." (See, also, 1 Jarman on Wills, page 119, to the same effect.)

Upon the trial the presumption that the will was revoked by the testator was sought to be overcome by showing that a previous search of the desk was made for the purpose of discovering the will, and that it was not then found; from which the claim is made that the will must have been in the possession of some other person than the testator and that it was subsequently placed in the desk with the signature canceled. It appears that two searches of the desk were made. The first by opening the drawers and looking in, but not by carefully taking out the papers and examining them. The next day a more careful search was made, after looking through the deposit vaults. At this time the papers were taken out and examined, but the will was not found. This examination was made by Mr. Warren, who occupied a desk in the same room with the decedent, and who had been connected with him in business for twenty-five years. It was made in the presence of the widow and her brother and was concluded between one and two o'clock in the afternoon. About four o'clock the same afternoon Mr. Warren went again to the desk to do some writing, and, he says, mechanically he put his hand on the little drawer and on pulling it open saw the blue envelope, which he took out and found to contain the will. The drawer appears to have been in little use for it contained only a few pens and an ink eraser besides the envelope containing the will. It was not shown that any person had possession of the instrument or had any motive to cancel it other than the son, who became chiefly benefited by its cancellation. It is not pretended that it was done by him, as he was only thirteen years of age, and he was not shown to have been at the office of his father after his death and before the instrument was found. It is, therefore, claimed upon the part of the guardian *ad litem* that the will was overlooked during the previous

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

examinations of the desk, and that the presumption in law that the will was canceled by the testator was not overcome by the evidence.

This brings us to the consideration of the other evidence given on behalf of the proponent to establish that the cancellation was not done by the testator. This evidence was given by the witness Carvalho, an expert in inks and handwriting. He was asked the following questions: "In your opinion, as an expert, were those perpendicular marks made by the same person as wrote the signature on that will?" This was objected to by the guardian *ad litem*, and the objection was overruled and an exception taken. He answered, "Judging from the material at hand, the signature of the will, I say, not." Q. "Judging from the signature R. E. Hopkins, as appears on the first page, and the signature Robt. E. Hopkins, as it is signed opposite the seal on the instrument, have you an opinion as to whether the marks, the fourteen marks, are written by the same hand?" To this the guardian *ad litem* also objected, and the same was overruled and exception taken. He answered, "I have an opinion." He was then asked, "What is that opinion?" Same objection, ruling and exception. He answered, "That they were not."

The will was drawn by a lawyer and was not in the handwriting of the testator. The signature appears upon the instrument at the end thereof, opposite the seal, and in the margin under the words "to the effect that an erasure was made before signing it." These signatures were written in a plain bold hand ten years before the testator's death and were the only writings which the expert had before him with which to compare the cancellation marks. Were these marks "writings" within the meaning of chapter 36 of the Laws of 1880 and chapter 555 of the Laws of 1888, which permit the comparison of writings by experts? The Appellate Division appears to have been of the opinion that they were. But we do not understand that such was the purpose or intent of these statutes. These enactments were considered by this court in the case of *People v. Molineux* (168 N. Y. 264), in which

the purpose of these statutes was pointed out. Prior to their enactment, comparison was permitted only with writings in evidence which were material upon some of the issues of the case. The expert was, therefore, limited in his investigation to an examination, in many instances, to but one or two specimens. The purpose of these statutes was to give him a broader field for his investigation by permitting other writings, which were not material upon the issues of the case, to be introduced in evidence solely for the purpose of comparison. The statutes do not purport nor were they intended to change the meaning of the word "writing" as it had theretofore been used and understood, or to authorize comparison with anything that was not previously regarded to be the subject of comparison.

The chief case relied upon in support of the admissibility of the testimony of the expert is that of *Lansing v. Russell* (3 Barb. Ch. Rep. 325). In that case the action was brought to set aside two conveyances of real estate executed by C. Lansing shortly before his death, he then being ninety years of age. The deeds were executed by his making his cross opposite the seal. The crosses were proved by a witness who saw the deeds executed. To rebut this the complainant produced upon the trial several witnesses, who were cashiers of banks and experts in detecting forgeries and counterfeits, to testify that in their opinion the marks made to these deeds were not the marks of a person of the age of Mr. Lansing. The chancellor said with reference thereto, "I think the testimony of the experts, who had been in the habit of examining signatures and marks of young persons as well as of aged ones to prove that the marks to these deeds could not have been genuine marks of the unaided hand of old age and decrepitude, was properly received, upon the trial, as legal evidence to establish that fact." The testimony of these experts, however, was rendered unimportant for the reason that the witness, who testified to the execution of the deed stated that Mr. Lansing, in making his mark, asked his son who was standing by to steady his hand, and thereupon his

N. Y. Rep.]

Opinion of the Court, per HAIGHT, J.

son took hold of his hand and assisted him in making the mark. It is true that this case is cited in the case of *Kowing v. Manly* (49 N. Y. 192-203), as is also that of *Moody v. Rowell* (17 Pick. 490), but not with approval, as is claimed, but for the purpose of showing that the question then under consideration was not controlled by those cases.

It is apparent that the case of *Lansing v. Russell* does not cover the question now presented. It is quite possible that an expert can determine whether a cross was made by a person in the prime of life with a steady hand, or by a person of advanced age with a feeble, trembling or shaking hand. Such testimony is not based upon the comparison of writings but is based upon the condition of the individual, and, therefore, the case is not decisive of that which we now have under review.

An expert may doubtless be able to determine whether one mark is made over another, whether a mark is made by a trembling or steady hand, and, if familiar with inks, he may also be able to determine nearly the age or the time that the writing was made. It has also been held that the mark of an individual to an instrument may be proved by those who have seen him make his mark to other instruments where the mark contains some peculiarity which they have noticed and observed, thus enabling them to distinguish it from other marks. (*Strong v. Brewer*, 17 Ala. 706; *Paisley v. Snipes*, 2 Brev. [S. C.] 200; *George v. Surrey*, 1 Moody & Malkin [Eng.] 516.) But this class of evidence is dependent upon the familiarity of the witnesses with the peculiarities of the persons making the cross, and is not the subject of the opinion of experts whose only knowledge or familiarity of writings is obtained by comparison.

In the case of *Jackson v. Van Dusen* (5 Johns. Rep. 144-155), VAN NESS, J., in delivering the opinion of the court, says: "The testator having made his mark, no evidence of course could be given or expected to prove his handwriting." In that case, one of the witnesses to the will, Samuel Wheeler, signed the same by making his initials, "S. W." The signing

of the will as a witness by Wheeler was proved by one Van Dyck, who had seen him sign the initial letters of his name and described the peculiarities of the characters as made by him. In this way he identified the letters as having been made by Wheeler. This, the judge said, was not the proof of Wheeler's signature by comparison of hands. In *Jackson v. Jackson* (39 N. Y. 153-160), WOODWORTH, J., says, "That when it is necessary to prove an execution of an instrument by a 'marksman,' the proof is evidence of the making of the mark. The writing of the name around it is no essential part of the evidence." In the case of *Shinkle v. Crock* (17 Penn. St. 159), the will of Susan Crock was executed by making her mark. A witness who was not present at the execution of the will was permitted to testify to his belief that the mark was genuine. His belief was founded upon his acquaintance with the mark, claiming that it had certain peculiarities which distinguished it from others. The judgment was reversed upon this ground. LEWIS, J., who delivered the opinion of the court, says: "We have gone far enough in receiving the bare belief of a witness, founded upon a comparison of writing in dispute, with some specimen of which he may have but a faint recollection. Where a mark, on inspection, appears to have nothing in its construction to distinguish it from the ordinary marks used by illiterate persons to authenticate their contracts, it is not the subject of this description of evidence."

In the case of *Gilliam v. Parkinson* (4 Rand. [Va.] 325), CARR, J., says: "In the case now before us, the attesting witness has made his mark. Now I ask, how could this be proved? There is a distinct individual character in the writing of every man who can write; and with those who have written much, that character is so fixed and striking that persons acquainted with it will find no more difficulty in recognizing it than in knowing the face of the writer. Where the name of a witness is written by himself, therefore, it may generally be proved with something like certainty. But here, there is no writing. The name of the witness is written by another, and he makes

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

a cross mark ; perhaps, the first and last he made in his life. To attempt to prove such a signature as this would be a mockery of justice."

In the case of *Jones v. Hough* (77 Ala. 437) the remarks of the judge in *Gilliam v. Parkinson* are quoted with approval, as is also the case of *Watts v. Kilburn* (7 Ga. 356), in which it is said that "where the name of a person is written by another and he makes a cross mark, there is nothing distinctive to fix its identity." In *Travers v. Snyder* (38 Ill. App. 382) the question was whether there can be a comparison between cross marks or a mere mark and another. With reference thereto the court said : "How can simply a mark be recognized as that of any particular person without any proof of any particular characteristic by which it can be distinguished ? It seems to us that it would be very unsafe, and lead to dangerous results to allow such comparison to be made and taken as evidence, unless, at least, some proof was made that the mark had some established characteristics like a handwriting that would enable it to be recognized. A mere cross or mark cannot be identified, and it, therefore, stands for itself alone."

In the early period of the English law expert testimony was unknown, but, as the world advanced in education, the courts commenced to avail themselves of the knowledge of others pertaining to scientific matters which was not possessed by ordinary individuals. From this beginning expert testimony has continued to grow in importance and in use until the present time. It, however, has met with much criticism on the part of the courts, and it has been denounced as misleading and unsatisfactory in numerous cases. It is, however, useful in a variety of cases and within reasonable bounds should be encouraged. But we have now reached a case where it is sought to establish that mere marks made over the signature were not made by the person who wrote the signature, by the opinion of an expert. This is carrying the use of the opinions of experts beyond any reported case to which our attention has been called, and we now think

that the time has come in which a limitation should be placed upon this class of evidence.

The general rule which admits of the proof of the handwriting of a party by experts, who have compared the writing with other writings of the person, is founded on the reason that in every person's writings there is a peculiar prevailing characteristic which distinguishes it from the handwritings of every other person, and, therefore, an expert, by studying characteristics as they appear in the writings of the person, may be able to determine with some degree of certainty as to whether a writing sought to be proved contains any of the characteristics of that of which he has examined and studied. But mere perpendicular marks, or scratches, used either perpendicularly or horizontally over a signature for the purpose of canceling it, do not contain the characteristics necessary in the formation of letters to enable an expert, or any person, to speak with any degree of certainty with reference to the identity of the person who made the marks.

In the case before us it is quite probable that the signature was canceled by the perpendicular marks ten years or thereabouts after the signature was written. The expert concedes this in giving the age of the ink marks over the signature, and yet, looking at the letters forming the signature made ten years before, he was allowed to give his opinion to the effect that the marks were not made by the same person who wrote the signature. This, we think, is carrying the privileges of an expert too far, and that the testimony is too dangerous and uncertain to be received as evidence and considered by either the court or jury.

The judgment of the Appellate Division and the decree of the Surrogate's Court should be reversed, and the proceedings remitted to Westchester county for a trial before a jury in the Supreme Court to determine whether the will in question was revoked by the testator, costs in all of the courts to abide the final award of costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, VANN, CULLEN and WERNER, JJ., concur.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK v. THE AMERICAN
LOAN AND TRUST COMPANY.

In the Matter of the Accounting of J. EDWARD SIMMONS, as
Receiver of THE AMERICAN LOAN AND TRUST COMPANY.

UNION DIME SAVINGS INSTITUTION et al., Appellants; LOUIS
BAUER et al., Respondents.

1. CORPORATIONS — WHEN INTEREST NOT ALLOWED AFTER RECEIVERSHIP OF INSOLVENT CORPORATIONS. In the settlement of the affairs of insolvent corporations, while interest is allowed as against the corporation itself or its stockholders if the assets are sufficient for the purpose, as between preferred and unpreferred creditors no interest is allowed after the law takes charge through the appointment of a receiver.

2. WHEN PREFERENCES TAKE EFFECT AND INTEREST CEASES. Under the provisions of the charter of an insolvent trust company (L. 1872, ch. 868; L. 1884, ch. 260, § 3), that "in case of the dissolution of the said company by the legislature, the Supreme Court, or otherwise, the debts due from the company as trustee, guardian, receiver or depository of money in court or of savings banks funds shall have a preference," as well as under a similar provision of the General Banking Law (L. 1892, ch. 689, § 130), preferences take effect upon the appointment of a receiver, but preferred creditors are not entitled, upon the settlement of the receiver's accounts and the distribution of the funds in his hands, to any interest, contractual or as damages, upon their claims, from the date of the appointment of the receiver; interest is payable to all creditors if the assets are sufficient; if not, interest ceases upon their claims, whether preferred or unpreferred, from the date of such appointment.

People v. American Loan & Trust Co., 70 App. Div. 579, affirmed.

(Argued October 8, 1902; decided November 11, 1902.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 5, 1902, which modified and affirmed as modified an order of Special Term entered upon the report of a referee on a final accounting.

The questions certified and the facts, so far as material, are stated in the opinion.

C. L. Stone, C. N. Bovee, Jr., William B. Lee and William W. Storrs, for Union Dime Savings Bank et al., appellants.

The interest is incident to the debt and is entitled to the same preference. It is to be computed at the rate of four per cent to the time of demand, and at the legal rate of six per cent thereafter to the time of actual payment. (*Matter of Fay*, 6 Misc. Rep. 462; *Upton v. N. Y. & E. Bank*, 13 Hun, 269; *Matter of Patterson*, 18 Hun, 221; *Champneys v. Lyle*, 1 Binney, 327; *National Bank v. M. Nat. Bank*, 94 U. S. 437; *Shultz v. Weaver*, 11 S. & R. 182; *Matter of Duncan*, 10 Daley, 95; *Matter of Haake*, 2 Sawy. 231; *Matter of Newland*, 7 Benedict, 63, 68; *People v. New York County*, 5 Cow. 334.) The rule of law which, in some cases, where interest is recoverable only as damages, precludes recovery of the interest by a separate action after the creditor has knowingly and intentionally accepted the principal sum of his demand without interest, should not be enforced upon this final accounting by the receiver so as to deprive the preferred creditors of payments otherwise lawfully their due and to divert the same for the benefit of the unpreferred creditors. (*Fake v. Eddy*, 15 Wend. 76; *Smith v. City of Buffalo*, 39 N. Y. Supp. 881; *Watts v. Garcia*, 40 Barb. 656; *S. C. R. Co. v. Moravia*, 61 Barb. 188; *O'Brien v. Young*, 95 N. Y. 430; *Devlin v. Mayor, etc.*, 131 N. Y. 123; *Matter of Murray*, 6 Paige, 205; *Woerz v. Schumacher*, 161 N. Y. 538; *Scott v. Morris*, 9 S. & R. 123; *People v. New York County*, 5 Cow. 331.) The statutes creating the preference are to be fairly and reasonably construed with the view of rendering effectual their purpose. A narrow or harsh construction with the view of limiting the preference should not be allowed. (*Cook v. Rindskopf*, 105 N. Y. 476; *Knapp v. McGowan*, 96 N. Y. 75; *Matter of Fay*, 6 Misc. Rep. 462; *People v. C. A. L. Ins. Co.*, 154 N. Y. 95; *Matter of E. R. F. L. Assn.*, 131 N. Y. 354.)

Vincent P. Donihee and Edward S. Hatch for Thomas P. Wickes, as receiver of Coffin & Stanton, appellant. This appellant and the other preferred creditors are entitled, under the terms of the charter of the American Loan and Trust

N. Y. Rep.]

Points of counsel.

Company, to legal interest upon their claims. (*Barnes v. Arnold*, 23 Misc. Rep. 198; *Upton v. N. Y. & E. Bank*, 13 Hun, 269; *Matter of Fay*, 6 Misc. Rep. 462; *Matter of Patterson*, 18 Hun, 221; 78 N. Y. 608; *National Bank v. M. Nat. Bank*, 94 U. S. 437; *Woerz v. Schumacher*, 161 N. Y. 530; *Matter of Duncan*, 10 Daly, 95.) The award of interest contained in the referee's second report was within the preference provisions of the charter; the method adopted by the referee was just toward all the creditors, and his report was more equitable than the orders now in force, which exclude everybody who accepted the report from participation in the interest fund set aside by the referee. (*Connecticut v. Jackson*, 1 Johns. Ch. 18.)

James Dunne for Louis Bauer et al., respondents. As framed, the question certified justifies the inference that the question of contractual interest was before the Appellate Division; as matter of fact, no such question was ever raised or presented by the appellant savings banks or Thomas P. Wickes, receiver. (*Hearst v. Shea*, 156 N. Y. 169; *Schenck v. Barnes*, 156 N. Y. 316; *Matter of Goatesworth*, 160 N. Y. 114; *Matter of Robinson*, 160 N. Y. 448.) Having rested their claim before the referee upon the theory of legal interest by way of damages, the appellant savings banks and Thomas P. Wickes, receiver, cannot claim for contractual interest on the hearing of the present appeal. (*Caponigri v. Altieri*, 135 N. Y. 255; *Kennedy Corp'n v. Kennedy*, 165 N. Y. 353.) The provisions of defendant's charter in respect to preferences, affecting, as they do, the property rights of unpreferred creditors in the assets of the defendant company as of the date of the insolvency, should receive an equitable construction at the hands of the court. (*C. Nat. Bank v. Armstrong*, 59 Fed. Rep. 372; *Merrill v. Nat. Bank*, 173 U. S. 131; *U. S. v. Kirby*, 7 Wall. 482; *Heydenfeldt v. D. G. & S. M. Co.*, 93 U. S. 634; *Lau Ow Bew v. U. S.*, 144 U. S. 47; *W. I. R. Co. v. C. D. N. Co.*, 160 U. S. 77; *Goilotel v. Mayor, etc.*, 87 N. Y. 441; *People ex rel. v. Lacombe*,

99 N. Y. 43; *Polhemus v. F. R. R. Co.*, 125 N. Y. 502; *Hayden v. Pierce*, 144 N. Y. 512.) Equitably construed, such provisions of defendant's charter will not be taken to include, as against unpreferred creditors, interest subsequent to the date of insolvency on the debts so preferred. (*Matter of Clark*, 168 N. Y. 427.) The equities in favor of the excepting unpreferred creditors are so clear and strong that they should be upheld, unless they conflict with some settled and inflexible rule or principle of law. The provisions of section 48, chapter 37, Laws of 1875, as amended by section 282, chapter 409, Laws of 1882, are not applicable to the question under consideration, or, if applicable, all rights thereunder have been waived by the preferred creditors. (*Upton v. N. Y. & E. Bank*, 13 Hun, 273; *Matter of Patterson*, 18 Hun, 221; *Abbotsford v. Johnson*, 98 U. S. 446; *Claflin v. C. Ins. Co.*, 110 U. S. 81; *U. S. v. Mooney*, 116 U. S. 104; *Davis v. Davis*, 75 N. Y. 221; *Pirie v. C. T. & T. Co.*, 182 U. S. 438; *Classon v. Baldwin*, 129 N. Y. 183.) The interest contended for by the appellant preferred creditors is not part of the debts preferred; it is interest by way of damages for detention in the payment of such debts through the administration of the receiver. (*Thomas v. W. C. Co.*, 149 U. S. 94; *Hawley v. Barker*, 5 Col. 118; *Donahue v. Partridge*, 160 Mass. 336.) The several orders of the court directing the payment of dividends on account of the principal of the preferred claims, the acceptance of same by the preferred creditors and their several receipts, showing that same were so applied, constitute a valid appropriation of such dividends in extinguishment of the principal of the preferred claims. (*Nat. Bank v. M. Nat. Bank*, 94 U. S. 437; *Matter of Clark*, 168 N. Y. 427; *Mayor, etc., v. M. R. Co.*, 143 N. Y. 1; 2 Am. & Eng. Ency. of Law [2d ed.], 471, 472; Munger on Payments, 70; *Page v. Lloyd*, 5 Pet. 304; *Alexander v. Patton*, 4 Cranch, 317; *Allen v. Culver*, 3 Den. 284; *Bloodworth v. Jacobs*, 2 La. Ann. 24; *Otto v. Klauber*, 23 Wis. 471; *U. S. v. Kirkpatrick*, 9 Wheat. 720; *Backhouse v. Patton*, 5 Pet. 160.) When interest is not stipulated for in the con-

N. Y. Rep.] Opinion of the Court per VANN, J.

tract, and is recoverable only as damages for the non-payment of the debt, a creditor is prevented from sustaining an action for its recovery after accepting the principal. (*Stewart v. Barnes*, 153 U. S. 455; *Cutler v. Mayor, etc.*, 92 N. Y. 166.) This court, in the light of the question certified and the appeals allowed to the appellant savings banks and Thomas P. Wickes, as receiver, will not entertain the contentions of Mrs. Hawes. (*Grannan v. W. R. Assn.*, 153 N. Y. 449; *Davis v. Cornue*, 151 N. Y. 172; *Matter of Westerfield*, 163 N. Y. 209.)

William S. Opdyke for receiver, respondent.

Barclay E. V. McCarty and *James Anderson Hawes* for Euphemia A. Hawes, as executrix of Granville P. Hawes, deceased, respondent. The questions brought up for review on these appeals necessarily require the determination of the rights of the respondent executrix, as well as those of the appellant savings banks and receiver, and of the respondents Bauer, Koester and O'Connor, in the remaining funds in the receiver's hands; and this court is expressly authorized to "grant to either party" such relief as the undisputed facts may warrant. (Code Civ. Pro. §§ 1295, 1337, 1361.)

VANN, J. By the charter of the American Loan and Trust Company it was provided that "in case of the dissolution of the said Company by the legislature, the Supreme Court or otherwise, the debts due from the Company as trustee, guardian, receiver or depositary of money in court or of savings banks' funds shall have a preference." (L. 1872, ch. 686; L. 1874, ch. 260, § 3.) Said company carried on business pursuant to its charter until the 18th of February, 1891, when the appellant savings banks demanded payment of their deposits which was refused, and thereupon it at once closed its doors and the superintendent of banks took possession. On the 7th of March following J. Edward Simmons was appointed temporary receiver, and on May 1st, 1891, the corporation was dissolved and he was appointed permanent

receiver. The savings banks and some others presented claims to the receiver as preferred creditors which were allowed by him as such, with interest at the contractual rate to the date of suspension. Subsequently by four successive dividends, declared pursuant to orders of the Supreme Court, he paid the principal of said claims, including interest at the rate provided for by the contract of deposit to the date of suspension, and the second and third payments were receipted for as dividends "on the principal of the claim." While said orders were made without notice to the preferred creditors, they knew of the making and entry of the same when they accepted and retained the money without complaint or question. The receipts for the fourth and last dividend stated that it completed "the payment of the principal of the claim."

On the final accounting taken before a referee the appellant savings banks and Thomas P. Wickes, as receiver of Coffin & Stanton, who were preferred creditors, claimed that they were entitled to interest at six per cent upon the amount of their respective claims from the date when the insolvent corporation suspended business, and this claim was allowed by the referee, but disallowed by order of the Special Term, which denied all interest upon the preferred claims either at the legal or the contractual rate. The order was affirmed, in this respect, by the Appellate Division, one of the justices dissenting upon the ground that interest should be allowed at the rate provided by the contract. The claim of the preferred creditors, if sustained, would not only exhaust the funds in the hands of the receiver and leave nothing for the unpreferred creditors, but would give them more interest than they had contracted for, or could have received if the company had not failed.

Subsequently leave was given to the Onondaga County Savings Bank, the Monroe County Savings Bank, the Union Dime Savings Institution and the Farmers and Mechanics' Savings Bank to appeal to this court and the following questions were certified for decision: "Are the appellant Savings

N. Y. Rep.] Opinion of the Court, per VANN, J.

Banks, or any of them, entitled to receive before payment of any dividends of the unpreferred creditors, any interest upon their deposits, demands or claims against the American Loan and Trust Company? If so, which of the said appellants are so entitled, for what time or times, at what rate or rates per cent per annum, and upon what basis of computation respectively?"

Leave was also given to Thomas P. Wickes, as receiver of Coffin & Stanton, to appeal to the Court of Appeals, and the following questions were certified for decision upon his appeal: "Is the appellant, Thomas P. Wickes, as receiver of Coffin & Stanton, entitled to receive before payment of any dividend of the unpreferred creditors any interest upon his claim against the American Loan and Trust Company? If so, for what time or times, at what rate or rates per cent per annum, and upon what basis of computation?"

As questions relating to interest are liable to arise so frequently in the settlement of the affairs of insolvent corporations, we adopt the broad, simple and just rule laid down in substance by the Appellate Division, that while interest is allowed as against the corporation itself, or its stockholders, if the assets are sufficient for the purpose, as between preferred and unpreferred creditors no interest is allowed after the law takes charge through the appointment of a receiver.

A corporation is created by the edict of the legislature and dies at its command. Knowledge is imputed to all who deal with it that when it suspends business the law takes charge of its affairs, liquidates its debts, converts its assets and distributes the proceeds among its creditors. Those who contract with it do so "with knowledge of the statutory conditions, and these must be deemed to have permeated the agreement and constituted elements of the obligation." (*People v. Globe Mut. Life Ins. Co.*, 91 N. Y. 174, 179; *People v. Security Life Ins. & Annuity Co.*, 78 N. Y. 115.) The process of administration provided by law is through a receiver, as the executive arm of the court. He is appointed for the benefit of all the creditors, both preferred and unpreferred,

and holds the assets, under the direction of the court, in trust primarily for them and finally for the corporation or its stockholders. Thereupon by operation of law the creditors become the equitable owners of the assets and the administration of affairs is for their benefit as such. The claims of creditors against the defunct corporation differ from their claims against its assets in sequestration, for they are not proved against the insolvent and dissolved nonentity, but against the fund in the receiver's hands. In the distribution of that fund the general rule applicable to insolvent estates, that equality is equity, should prevail so far as the statute, when reasonably construed, will permit. We agree with the learned Appellate Division that the statutory "provision was made with the intention that the preference should take effect at the time at which all claims against the corporation would be presentable, and that it was not the intention of the legislature to allow either contractual interest or interest as damages, to run on indefinitely through all the protracted proceedings that might continue, as they did in this case, for many years after the court took possession of the assets for the purpose of making distribution of them."

The claims of creditors are presentable when the receiver is appointed, and that date fixes their status and amount, regardless of when they are in fact presented. As we said in a recent case, "it is the day on which the court practically takes possession of the assets of the company for the purpose of distribution among its creditors, and consequently (that) is the day on which the rights of creditors should be ascertained and the value of their claims determined." (*People v. Commercial Alliance Life Ins. Co.*, 154 N. Y. 95, 98.) In rendering judgment in that case we relied upon *Matter of the Equitable Reserve Fund Life Association of the City of New York* (131 N. Y. 354) and *People ex rel. Atty.-General v. Life and Reserve Association of Buffalo* (150 N. Y. 94). While these cases related to defunct life insurance companies, we think the principle upon which they rest is applicable to the case in hand.

As the statute does not say that preferred claims shall be paid with interest to the date of payment, the courts should not, because the claims of substantially all the creditors, both preferred and unpreferred, were alike in origin, for they were created by the deposit of money, and preferences in derogation of the common law should not be extended by construction beyond the express command of the statute. If the fund in the hands of the court could have been distributed on the same day that the receiver was appointed, no claim of interest could have arisen, for there would have been no delay and no suspension of legal remedies. The delay in distribution, however, was the act of the law itself, and was essential for various purposes and among others to enable the creditors to prove their claims. "As a general rule, after property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed on the claims against the funds." (*Thomas v. Western Car Co.*, 149 U. S. 116.) Interest should not run in favor of one creditor at the expense of another, while the law, acting for all, is administering the assets. If the assets are sufficient to pay all, including interest, it must be paid, for as against the corporation itself interest should be allowed before the return of any surplus to the stockholders. As between the creditors themselves, however, no interest should be allowed during the process of administration, and the delay necessarily resulting therefrom, because the assets are equitably their assets, the administration is for their benefit and the delay is necessary to enable them to take action to present their claims in proper form, as well as to enable the court to put the assets in shape for distribution.

As the decree of dissolution relates back to the day when the court took possession of the assets, the delay is not the act or omission of the corporation, which is *civiliter mortuus*, but is owing to the law and hence should operate neither to benefit nor prejudice any creditor. Distribution should be made as of the date when the delay began, for it was not only caused by the law but was necessary for the protection of all

classes of creditors. As between the creditors themselves, therefore, interest ceases to accrue upon their respective claims, whether preferred or unpreferred, from the day when the corporation let go and the court took hold. This rule is so simple and easy of application that it will not only tend to prevent litigation, but will stimulate all creditors to frown upon delay and to promptly call the receiver to account. It will not induce preferred creditors to rest easy in reliance upon the expectation that they will make money through the misfortune of the corporation and, during the entire period of administration, receive interest at a greater rate than they had contracted for.

This rule is consistent with the provisions governing preferences as they appear not only in the special charter of the American Loan & Trust Company, already cited, but also in the General Banking Law (L. 1892, ch. 689, § 130). The preference provided by the one is "the debts due," and by the other, "the sums of money deposited," and as both depend on the fact of dissolution or insolvency, both may properly be held to refer to the date when the event took place which brought the preference into action. On that date distribution should have been made, but as both the court and the creditors required time, it should be made as of that date and upon the claims as they then stood.

No authority has been cited which should prevent us from laying down this useful and convenient rule. Questions relating to the allowance of interest upon preferred claims have usually been regarded as of such slight importance as to receive scant attention in the reported cases, and to rest upon the mere announcement of the result. When a question slips through the courts without discussion or anything to indicate deliberate judgment, the decision is not of great value as an authority, at least until it has stood the test of citation without criticism. This was the method of decision so far as the question of interest was concerned in *Upton v. New York & Erie Bank* (13 Hun, 269, 273) and *Matter of Patterson* (18 Hun, 221, 224). While we decided the latter case upon the

N. Y. Rep.]

Statement of case.

opinion of the General Term (78 N. Y. 608), reference to that opinion shows an able discussion of a question not now material and a statement that no question was made in that court in relation to interest. If the question was not raised in the court below, we were at liberty to disregard it. We decided nothing but what the General Term decided, and as it did not pass upon the question of interest, because it was not raised, we did not.

The respondent Euphemia A. Hawes, as executrix, complains that injustice was done her by the decision of the Appellate Division in not only denying her a preference, but also in excluding her even as an unpreferred creditor. So far as we can now see, the latter ground of complaint seems well founded, but as the person making it did not appeal to this court, and no question affecting her rights has been certified to us, we are unable to relieve her, and she must await the issue of another remedy.

The orders appealed from should be affirmed, with costs to the receiver, payable out of the fund, and to the other respondents, Mrs. Hawes as executrix excepted, payable by the appellants. The direct questions certified should be answered in the negative, and the contingent questions should not be answered at all.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, CULLEN and WERNER, JJ., concur.

Ordered accordingly.

ELIZABETH HORSTMANN, Respondent, v. AMELIA FLEGE et al.,
Appellants.

DOWER—WIDOW NOT PUT TO AN ELECTION BETWEEN AN ANNUITY CHARGED UPON REAL ESTATE AND HER DOWER. Where a testator devised his real estate to his children, charging upon the portion devised to each, with one exception, an annuity which he required the devisee to pay to his widow annually during her life, no other provision being made for the widow, and the will does not in terms state that the annuities provided for were to be in lieu of dower, the widow will not be put to an

election between the annuities and her dower, but is entitled to both, and may maintain an action for the admeasurement of her dower.

Horstmann v. Flege, 61 App. Div. 518, affirmed.

(Argued October 22, 1902; decided November 11, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 13, 1901, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

Edward L. Frost for appellants. The widow is not entitled to dower if the acceptance of it by her is inconsistent with other provisions of the will for her benefit. (*Adsit v. Adsit*, 2 Johns. Ch. 448; *Savage v. Burnham*, 17 N. Y. 577.) The provision for the plaintiff in her husband's will is inconsistent with her claim for dower. (*Matter of Zahrt*, 94 N. Y. 609; *Koezly v. Koezly*, 31 Misc. Rep. 397; *La Fevre v. Toole*, 84 N. Y. 96; *Asche v. Asche*, 113 N. Y. 232.)

Edward T. Horwill for respondent. Dower is favored. It is never excluded by a provision for a wife, except by express words or by necessary implication. (*Konvalinka v. Schlegel*, 104 N. Y. 125.) The mere gift of an annuity by the testator to his widow, although charged upon all his property, is not sufficient to put her to her election between that and dower, even although the will contains a gift of the whole of the testator's real estate to another person. (Story's Eq. Juris. § 1088; 2 Scribner on Dower [2d ed.], 461, 462; *Fuller v. Yates*, 8 Paige, 325.) An annuity out of the estate is now held not to have the effect of barring the wife of her dower, as inconsistent with it. (*Harrison v. Harrison*, 1 Keen, 765; Story's Eq. Juris. § 1088.) The widow is entitled to both dower and the annuities. (*Konvalinka v. Schlegel*, 104 N. Y. 125; *Glaser v. Glaser*, 67 App. Div. 132; *Purdy v. Purdy*, 18 App. Div. 310; *Hopkins v. Cameron*, 34 Misc. Rep. 688; *Fenton v. Fenton*, 35 Misc.

N. Y. Rep.]

Opinion of the Court, per HAIGHT, J.

Rep. 479; *Matter of Grotrian*, 30 Misc. Rep. 23; *Gray v. Gray*, 5 App. Div. 132; *Kursheedt v. U. D. S. Inst.*, 118 N. Y. 358.) Dower is an incumbrance on a decedent's property as real as though the widow held a blanket mortgage covering same. (*Closs v. Eldert*, 30 App. Div. 338; *Konvalinka v. Schlegel*, 104 N. Y. 125.) To require a widow to elect between the testamentary provision made in her behalf and dower, it must clearly and manifestly appear by implication that the testator intended that the provision made in his will for her should be in lieu of dower. (*Kimbel v. Kimbel*, 14 App. Div. 570, 574; *Ellis v. Lewis*, 3 Hare, 310; *Gibson v. Gibson*, 1 Drewry, 42; *Havens v. Havens*, 1 Sandf. Ch. 324; *Mills v. Mills*, 28 Barb. 454; *Havens v. Sackett*, 15 N. Y. 365; *Adsit v. Adsit*, 2 Johns. Ch. 448; *Church v. Bell*, 2 Den. 430; *Purdy v. Purdy*, 18 App. Div. 310; *Ellicott v. Mosier*, 7 N. Y. 201; *Lewis v. Smith*, 9 N. Y. 502.)

HAIGHT, J. This action was brought by the plaintiff, as the widow of Luhr Horstmann, Sr., for the admeasurement of dower in the premises of which her husband died seized.

Luhr Horstmann was the owner of fourteen parcels of land of the value of about \$53,000 at the time of his death. He left a last will and testament, which has been duly proved and admitted to probate. By his will he divided his real estate among his children, charging upon the portion devised to each, with one exception, an annuity amounting in the aggregate to \$500 per year, which he required the devisee to pay to his widow annually during her life. No other provision was made for the widow, and the will does not in terms state that the annuities provided for were to be in lieu of dower. The provisions devising the real estate to his children are substantially alike, except as to the description of the property devised, and for the purpose of the determination of the question presented by this appeal it will only be necessary to call attention to one of the provisions. It is as follows:

"*Second.* I give, devise and bequeath to my son, Luhr

Horstmann, Jr., my four houses situate on the west side of Centerville avenue. * * * Subject to the payment to my wife, Elizabeth, of the sum of \$100 per year, payable quarterly, beginning from the date of my death, which payments or annuities are hereby charged upon said devisee and upon said property. To have and to hold unto him, his heirs and assigns forever, subject to said annuity."

It will be observed that the payment of annuity is charged upon the devisee and upon the property and it is not payable out of the income, so that the son in accepting the devise and entering into the possession of the property became charged with the payment of the annuity, independent of the income or rents therefrom.

Dower is favored in the law and the widow is entitled to have the same admeasured, unless the testamentary provision made in her behalf expressly states that the same is to be in lieu of dower, or the intention of the testator to that effect is clearly implied from the provision of the will. If in the provision of the will it is expressly stated to be in lieu of dower, or such intention is clearly implied, the widow is put to her election. But if there is reasonable doubt with reference to the intention of the testator, the widow takes both dower and the provision made for her in the will. (*Adsit v. Adsit*, 2 John. Ch. Rep. 448; *Lewis v. Smith*, 9 N. Y. 502; *Tobias v. Ketchum*, 32 N. Y. 319; *Vernon v. Vernon*, 53 N. Y. 357.)

As bearing upon the intention of the testator it becomes necessary to examine the provisions of the will for the purpose of determining whether the widow's claim for dower is inconsistent therewith. This question has been frequently before the courts, and much has been written upon the subject. It was considered by us recently in the matter of the judicial settlement of the accounts of Joseph Gorden as executor and trustee under the will of William Gorden, deceased. (172 N. Y. 25.) In that case, however, the testator, after some specific bequests and devises, gave all the rest of his estate, both real and personal, to his executors in trust to collect the rents and profits; and, after paying the necessary expenses, he

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

directed his trustees to pay one-third of the net income to his widow and the remaining two-thirds to the maintenance of his children. In that case this court held that the widow's claim for dower was inconsistent with the provisions of the will. The devise of *all* of his real estate to trustees, imposing upon them the duty of collecting the rents and profits therefrom, could not be carried out as to all of the real estate if one-third thereof was to be set off and the possession thereof given to the widow.

In the case now under consideration the devise is quite different. No trust is created and no duty is cast upon others with reference to the collecting of the rents and profits. The different parcels of real estate are separately described and devised to some particular child specifically named, but subject to the payment of an annuity which is charged upon the devisee and upon the property. The question, therefore, now arises as to whether the charge of an annuity upon real estate is inconsistent with the claim for dower. This question was first answered in the case of *Pitts v. Snowden* by Lord HARDWICK. In that case the testator gave to his wife fifty pounds per annum, payable out of his freehold and copyhold messuage; and, subject to that annuity, he divided those messuages absolutely among his three children. The widow claimed both annuity and dower, and her claim was sustained. This case was followed by the case of *Arnold v. Kempstead* and that of *Villareal v. Lord Galway*, decided by Lords NORTHINGTON and CAMDEN, in which a different result was reached. But in the still later case of *Pearson v. Pearson*, Lord LOUGHBOROUGH was of the opinion that the giving of an annuity out of an estate from which dower arises is not of itself a sufficient bar; but concluded by referring the case to a master to inquire whether the estate was sufficient for both purposes. In a still later case Lord THURLOW, in considering the same question, said that he saw no reason why the widow should not have both annuity and dower. He was of the opinion that an annuity given to the wife out of the testator's estate, and a devise of all of his estate subject to that, afforded

Opinion of the Court, per HAIGHT, J.

[Vol. 172.]

no foundation of an intention to bar her paramount claim for dower; and in referring to the case of *Pearson v. Pearson* he expressed the view that the reference to the master was unnecessary. This was followed by Sir THOMAS SEWELL in *Wride v. Clark*, who approved of *Lawrence v. Lawrence*, thus reaffirming the ancient doctrine declared by Lord HARDWICKE, and disapproving of the cases of *Arnold v. Kempstead* and *Vallareal v. Lord Galway*. The report of these cases is made by Lord ALVANLEY, as master of the rolls, in the case of *French v. Davies* (2 Vesey's Ch. Rep. 572, 578). The next case in England in which the question appears to have arisen is that of *Holdich v. Holdich* (21 Eng. Ch. Rep. 17, 21). In that case the vice-chancellor said: "I feel bound by the present state of the authorities to say that a mere gift of an annuity to the testator's widow, although charged on all the testator's property, is not sufficient to put her to her election."

In this country the question appears to have been examined first by Chancellor KENT in the case of *Adsit v. Adsit* (2 John. Ch. Rep. 448). He considers all of the English cases upon this subject and reaches the same conclusion. And, again, in the case of *Fuller v. Yates* (8 Paige's Ch. Rep. 325), Chancellor WALWORTH appears to have reached the same conclusion. In Story's Equity (sec. 1086) it is said: "Again, if a testator should bequeath property to his wife, manifestly with the intention of its being in satisfaction of her dower, it would create a case of election. But such an intention must be clear and free from ambiguity. And it will not be inferred from the mere fact of the testator's making a general distribution of all of his property, although he should give his wife a legacy; for he might intend to give only what was strictly his own, subject to dower. * * * There is no repugnancy in such a devise or bequest to her title to dower. * * * So, the mere gift of an annuity by the testator to his widow, although charged upon all his property, is not sufficient to put her to an election between that and dower, even although the will contains the gift of the whole of the testator's real estate to another person."

N. Y. Rep.]

Statement of case.

The general doctrine has been repeated in a number of cases reported in this court. Notably, that of *Konvalinka v. Schlegel* (104 N. Y. 125). The rule laid down by Story was followed recently by the Appellate Division in the case of *Closs v. Eldert* (30 App. Div. 338). The case of *Matter of Zahrt* (94 N. Y. 605) is clearly distinguishable and is not in conflict. In that case the will gives to the widow during her life the rents, income, interest, use and occupancy of all his estate, real and personal, upon certain conditions specified. It was held that the provision was inconsistent with a claim for dower.

In the case before us, as we have shown, the widow is given no interests in the rent or income from the real estate. Her annuity is not payable out of the income; it is a charge against the devisee and the property. If the annuity had been made payable out of the income a different question would have been presented; one which we are not now called upon to determine. The devise was to a child of a specific parcel of real estate, against which the widow had a claim for dower. The charging of an annuity in the widow's favor must be treated as an additional claim to that of dower.

The judgment should be affirmed, with costs.

PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, MARTIN and VANN, JJ., concur.

Judgment affirmed.

LOUIS BECK, Respondent, v. THE CATHOLIC UNIVERSITY OF AMERICA, Appellant, et al., Respondents.

MECHANIC'S LIEN — WHEN VENDOR OF REAL PROPERTY IS NOT LIABLE FOR BUILDINGS ERECTED BY VENDEE TO WHOM POSSESSION IS GIVEN "FOR THE PURPOSE OF ERECTING BUILDINGS THEREON." Where land sold under an executory contract was retaken by the vendor upon the vendee's default in payment, a person who performed labor and furnished materials for buildings erected upon the land by the vendee while in possession thereof, is not entitled to a judgment enforcing a mechanic's lien thereon against the vendor, where there is no proof that the vendor had any knowledge as to the character of the building to be erected, or of

the erection of the building constructed, or that the vendor acquiesced therein, and the only ground relied upon as constituting the vendor's consent to the erection of such building is a provision of the contract that the vendee should have immediate possession of the property "for the purpose of erecting buildings thereon."

Beck v. Catholic University, 62 App. Div. 599, reversed.

(Argued October 27, 1902; decided November 11, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 20, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The action was to foreclose a mechanic's lien upon real property owned by the appellant situated on Riverside drive in the city of New York. It consisted of six lots which the appellant, by an executory contract, sold to the defendant Dexter for one hundred thousand dollars. Dexter employed the plaintiff to erect a building for a restaurant thereon, and out of this employment the plaintiff's claim arose, for which he filed a mechanic's lien and which he sought by this action to foreclose. Several of the defendants filed liens against the property which they also sought to enforce in this action. In December, 1897, Dexter defaulted in payment under his contract, his right to the property ceased, and the university took possession thereof. The building upon the premises was constructed while Dexter was in possession. The plaintiff recovered a judgment awarding him a lien thereon for \$9,020.32, the defendant Hamilton for \$614.56, and the defendants Mackey and Smith for the sum of \$785. The judgment of the Special Term was affirmed by a divided court.

Abram I. Elkus and *Joseph M. Proskauer* for appellant. The Mechanics' Lien Law provides that to subject land to a mechanic's lien the improvements must be made thereon with the consent of the owner. Here there was no express consent on the part of the university or any of its officers, and it cannot be implied from the clause in the contract with Dexter

N. Y. Rep.]

Points of counsel.

that "the vendee shall have the right of immediate possession of the property for the purpose of erecting buildings." (*De Klyn v. Gould*, 165 N. Y. 282; *Hankinson v. Vantine*, 152 N. Y. 20; *Cowen v. Paddock*, 137 N. Y. 188; *De Klyn v. Simpson*, 34 App. Div. 442; *N. W. P. Co. v. Sire*, 163 N. Y. 122; *Burkitt v. Harper*, 79 N. Y. 273; *Butler v. Flynn*, 51 App. Div. 225; *Otis v. Dodd*, 90 N. Y. 336; *Hackett v. Badeau*, 63 N. Y. 476; *Schmalz v. Mead*, 125 N. Y. 188.) The contract contained merely a permission, not a consent. (*Vosseller v. Slater*, 25 App. Div. 368; 163 N. Y. 564; *Havens v. W. S. Co.*, 49 N. Y. S. R. 771.) There was no consent in the alleged conversations with Mr. Dahlgren, the university's attorney at law. (*Marvin v. Wilbur*, 52 N. Y. 270; *Duffus v. Schwinger*, 79 Hun, 541; *W. R. Co. v. Tappan*, 80 Hun, 219; *Gould v. Town of Sterling*, 23 N. Y. 463; *Stringham v. St. Nicholas Ins. Co.*, 4 Abb. Pr. 315; *Hubbard v. Elmer*, 7 Wend. 446.) The university was not the owner within the meaning of the Mechanics' Lien Law. (L. 1885, ch. 242, § 5; *Vosseller v. Slater*, 25 App. Div. 368.)

Alfred B. Cruikshank for plaintiff, respondent. The proof clearly established the consent of the owner, the Catholic University of America, to the erection of the building. (*Hyatt v. Clark*, 118 N. Y. 563; Story on Agency, § 140; *Hackett v. Badeau*, 63 N. Y. 476; *Nellis v. Bellinger*, 6 Hun, 560; *Burkitt v. Harper*, 79 N. Y. 273; *Husted v. Mathes*, 77 N. Y. 388; *Otis v. Dodd*, 90 N. Y. 336; *Kealey v. Murray*, 15 N. Y. Supp. 403; *Schmalz v. Mead*, 125 N. Y. 188; *Miller v. Mead*, 127 N. Y. 544; *Cowen v. Paddock*, 137 N. Y. 188.) The university was the owner within the Mechanics' Lien Law, and plaintiff's lien covers the interest both of the university and of Dexter. (*Miller v. Mead*, 127 N. Y. 544; *Schmalz v. Mead*, 125 N. Y. 188.)

Louis S. Phillips for Oscar T. Mackey et al., respondents. The building was constructed with the consent of the

university, the owner of the real property, or of its agent, within the meaning of section 3 of the Lien law. (*Schmalz v. Mead*, 125 N. Y. 188; *Miller v. Mead*, 127 N. Y. 544; *Cowen v. Paddock*, 137 N. Y. 188; *Kealey v. Murray*, 15 N. Y. Supp. 403; *Nat. W. P. Co. v. Sire*, 163 N. Y. 122; *Otis v. Dodd*, 90 N. Y. 336.) The proof was sufficient to show that Dahlgren was the agent of the university for the sale and disposition of the property. (*Griffen v. Manice*, 166 N. Y. 188; *Hyatt v. Clark*, 118 N. Y. 563; Story on Agency, §§ 134, 137, 140; *Henry v. Allen*, 151 N. Y. 9; *Benedict v. Arnoux*, 154 N. Y. 728; *Wylde v. N. R. R. Co.*, 53 N. Y. 156; *Matter of Randall*, 158 N. Y. 219; *The Odorilla v. Baizley*, 122 Penn. St. 292; Greenl. on Ev. [16th ed.] 308, § 184.)

Wilfrid N. O'Neil for John A. Hamilton, respondent. The consent of the university to the improvements by the plaintiff and the other lienors was clearly shown. (*Fejdowski v. D. & H. C. Co.*, 168 N. Y. 500; *Schmalz v. Mead*, 125 N. Y. 188; *Butler v. Flynn*, 51 App. Div. 224; *Kealey v. Murray*, 15 N. Y. Supp. 403.)

Per Curiam. The judgment appealed from should be reversed. The mechanics' liens involved in this action were filed against property now owned by the Catholic University of America. The appellant insists that the labor and materials furnished, for which liens were filed, were not furnished either with its consent or at its request, although its property has been held liable therefor. It is not even pretended that the university requested the performance of the labor or the furnishing of the materials employed in the erection of the building upon the appellant's land. Nor do we think there was any such consent as is contemplated by the statute relating to the subject. We fully concur with the learned Appellate Division in the opinion that no consent by the university was established by the parol evidence in the case, as it was not proved that Dahlgren was a general agent of the univer-

sity, nor was he shown to have been authorized by it to do anything concerning the erection of such building. Consequently no inference of authority or consent can be drawn from the testimony as to his acts or declarations. The only ground upon which the Appellate Division held that the university consented to the erection of buildings on its land is that the contract of sale effected such consent. The provision upon which that court relied as constituting consent was as follows: "It is further understood and agreed that the vendee shall have the right of immediate possession to the property hereinbefore mentioned and described for the purpose of erecting buildings thereon." Obviously, the only effect of that provision was to give the vendee the right of possession which he would not otherwise have had, and it cannot be regarded as a consent under the provisions of the Lien Law to the erection of the building constructed by Dexter. It is to be observed that, while there was consent by the vendor that the vendee should have the right of possession for the purpose of erecting buildings thereon, there was no consent whatever to the construction of the particular building erected. It is quite evident that the university had knowledge of the fact that the defendant Dexter intended to improve the property by the erection of a building thereon. There was, however, no proof of any knowledge upon its part as to the character of the building to be erected, of the erection of the building constructed, or that the university acquiesced therein. Proof of the existence of that knowledge was insufficient to establish a consent, under the Lien Law, to the erection of any building which the vendee should conclude to or did erect. The decision of the learned Appellate Division in that respect is in direct conflict with the later decisions of this court. (*Vosseller v. Slater*, 25 App. Div. 368, 372; affirmed, 163 N. Y. 564; *Havens v. West Side Electric L. & P. Co.*, 49 N. Y. St. R. 771; affirmed, 60 N. Y. St. R. 874; *Hankinson v. Vantine*, 152 N. Y. 20, 29; *De Klyn v. Gould*, 165 N. Y. 282, 286; *Rice v. Culver*, 172 N. Y. 60.)

The *Vosseller* case was quite similar to the case at bar.

It was there held that the property of the vendor was not subject to a mechanic's lien upon the buildings erected or altered by the vendee. In that case it was said: "It would be a most unusual statute and of doubtful validity which should provide that, in case a vendor sells real estate by an ordinary executory contract of sale, knowing that the vendee intended to erect a building thereon, the vendor's interest should be charged with a lien for the expense of erecting a building, and so improve the vendor out of his estate." In that case, as in this, there was no provision in the contract which required the vendee to make the improvements which were made upon the premises. In the *Havens* case it was held that the mere fact that a landlord may know that his tenant contemplates making certain improvements or applying the property to certain purposes, cannot make the former liable for the expense of such work. The *Hankinson* case is to the effect that a mere general consent of an owner that the lessee in occupation may, at his own expense, make alterations in a building occupied by him, does not constitute a consent by the owner that a third party shall furnish labor or materials for the alterations, so as to make such labor and materials the basis of a mechanic's lien upon the building, especially in the absence of any notice or knowledge on the part of the owner from which such consent can be implied. After reviewing several authorities in this court, it was there said: "Thus it seems that the requirements of this statute as to consent are not met by a mere general agreement to the effect that a third person may, at his own expense, make alterations in a building occupied by him. The statute requires more. It requires either that the owner shall expressly consent to the particular alteration made, or that, with a knowledge of the particular object for which they are employed, he acquiesces in the means adopted for that purpose." In the *De Klyn* case it was decided that the consent necessary under the Mechanics' Lien Law, to render the owner liable for work done or materials furnished, will not be implied from a mere acquiescence by the owner in the alterations, in the absence of

any affirmative act or declaration on his part, which might have misled the lessee or contractor. It was there said: "The owner's interest in his real estate is not liable in every case in which to his knowledge labor and materials are furnished for erections upon his real property or alterations in the existing erections. * * * Consent is not a vacant or neutral attitude in respect of a question of such material interest to the property owner." In *Rice v. Culver* the authorities relating to the subject were quite exhaustively examined, and we held that to constitute the consent mentioned in the statute the owner must either be an affirmative factor in procuring the improvement to be made, or having possession and control of the premises, assent to the improvement in the expectation that he will receive the benefit of it. This review of the authorities discloses that the consent relied upon by the respondent was insufficient to justify the court in holding the land of the university liable to the liens sought to be enforced in this action. Therefore, there was in this case no evidence to justify the trial court in finding that the labor and materials performed and furnished by the lienors were furnished with the consent of the university.

It thus appearing that there was no evidence which, according to any reasonable view, supports the finding of the trial court, and as the affirmance by the Appellate Division was not unanimous, the question whether there was any evidence to support that finding raises a question of law which the Court of Appeals may review. (*Ostrom v. Greene*, 161 N. Y. 353.)

While there were several other questions presented upon the argument and in the briefs of counsel, still, as the judgment must be reversed upon the ground that there was no valid consent by the owner which made its land liable for the liens placed thereon, no discussion of those questions seems necessary. It may, however, be remarked that the admission of the evidence as to the acts and declarations of Dahlgren was clearly erroneous, and the judgment might well be reversed upon that ground.

lending money on personal property, and to forbid certain loans of money, property or credit," passed April 17th, 1895 (L. 1895, ch. 326). This statute was so amended in 1896 as to provide that it should not apply to two counties, one of which is the county of Westchester where the plaintiff resides. (L. 1896, ch. 206, § 2.) By this act the defendant was authorized to lend money to such persons "as shall be deemed by it in need of pecuniary assistance" and to "take as security for the payment of any such loan either a pledge or a mortgage of any personal property." It is entitled to act as pawnbroker without obtaining a license or filing any bond other than that provided for in the act, and it may "charge and receive upon each loan made by it without the actual delivery to it of the property pledged or mortgaged, which charge shall include all services of every character, in connection with said loan, except upon the foreclosure of the security, interest or discount at a rate not exceeding three per centum per month for a period of two months or less, and not exceeding two per centum per month for any period after said two months; and also a sum not exceeding three dollars for the first examinations of the property to be pledged or mortgaged and for drawing and filing the necessary papers." But, as the act further provides, "no such loan greater than two hundred dollars shall be made, nor shall any one person owe such corporation more than two hundred dollars for principal at any one time." The corporation is not permitted to declare dividends exceeding ten per cent in any year, and when it "shall have accumulated a surplus amounting to fifty per cent of its capital, the superintendent of the banking department" is given authority "to make an order reducing the rates of interest, discount and charges which such corporation may lawfully charge and receive upon loans, to such sums as will, in his judgment, produce a net return of ten per cent on its capital stock."

On the first of November, 1897, the defendant agreed to loan \$150 to the plaintiff for the term of one month, but it actually delivered to him only \$138.50, although it took from

N. Y. Rep.] Opinion of the Court, per VANN, J.

him two notes for \$75 each, the balance having been retained under the cover of interest and charges. On the first day of every month thereafter to and including September, 1900, the defendant extended the time of payment of said loan and on each occasion received from the plaintiff therefor the sum of \$11.50. Two chattel mortgages were given by the plaintiff upon personal property situate in his residence in Westchester county to secure said loan when made and upon each renewal thereof.

To a complaint alleging these, among other facts, and demanding that the loan be declared void, the notes and mortgages surrendered and the defendant restrained, *pendente lite*, from foreclosing the mortgages, the defendant demurred upon the ground that no cause of action was set forth. The courts below united in overruling the demurrer, and from a final judgment entered accordingly this appeal was taken.

The appellant claims that the general usury law has no application to corporations organized under the act in question, because it is not referred to therein. It further contends that protection against abuses is provided by the bond required of the corporation by the second section of the act. That bond, however, does not aid the borrower, as it is to be prosecuted, if knowingly violated, in the name of the People and the proceeds belong to the state. While a reward of \$250 is provided for the person "first giving information and furnishing legal proof of" a violation of the restrictions of the act by the corporation, that is for the benefit of any informer, whether injured or not, and does not apply to the borrower any more than to a stranger.

We think that the act under consideration should be construed in connection with the general statute against usury and as modifying the latter only to the extent mentioned and provided. The Revised Statutes fix the rate of interest at six per cent, prohibit the receipt of interest at a greater rate and forfeit both principal and interest if a higher rate is knowingly taken. (1 R. S. 771.) This has been the established policy of the state for so many years that a departure therefrom, not

by way of general repeal, or so as to affect business transactions of magnitude, but to aid the poor borrower in procuring a small loan upon the security of his household furniture or other personal property, should be so construed, if practicable, as to protect the class for whose benefit the change was made. Persons who borrow small sums, never exceeding in the aggregate two hundred dollars, on the strength of such security, need the protection of a statute against usury more than any other class, for they are usually without credit, business experience or the ability to protect their property from sacrifice if they are not able to repay the loan. They are the persons most likely to be taken advantage of by a grasping and rapacious money lender.

The primary object of the statute of 1895 was not to create a new kind of corporation for the purpose of enabling the incorporators to make money, but to rescue people of small means from the grasp of those who were disposed to take advantage of the ignorant and needy borrower. It authorizes corporations formed under it to make small loans only, upon the security of personal property and to charge a rate of interest much greater than the usual rate provided by law, but still reasonable under the circumstances, considering the trouble and hazard. It provides that the sum charged for interest shall include all services of every character, except upon foreclosure and except also that it permits a maximum charge of three dollars for "first examinations" of the property to be pledged or mortgaged and for drawing and filing the necessary papers. It also prohibits persons or corporations, other than those organized under the act, from charging or receiving in any county where such a corporation is located, "any interest, discount or consideration greater than at the rate of six per cent per annum upon the loan, use or forbearance of money, goods or things in action less than two hundred dollars in amount or value," or upon the loan of personal credit made on the security of household furniture, etc. "Any person, and the several officers of any corporation, who shall violate the foregoing prohibition, shall be guilty of a

N. Y. Rep.] Opinion of the Court, per VANN, J.

misdeemeanor, and upon proof of such fact the debt shall be discharged and the security" adjudged void.

The object of the statute was to place the small borrower in the hands of a responsible party and to shield him from the class accustomed to charging excessive interest. While great care is taken in the act to punish all who charge more than six per cent, except the corporations organized under it, still it inflicts no penalty upon such corporations and provides no relief for the borrower in case they take advantage of his necessities by charging a greater rate of interest than is allowed by it. The facts in this case illustrate the necessity for some safeguard to protect the borrower, as the plaintiff has paid to the defendant for interest and charges upon the loan or forbearance of about \$150 from November 1st, 1897, to October 1st, 1900, the sum of \$402.50 instead of \$111, the amount allowed by the statute. Did the legislature intend that such corporations, enjoying such unusual privileges, could charge any rate of interest they saw fit with impunity?

In view of the well-known fact that as a rule those who make a business of lending to the poor are apt to charge extortionate rates of interest, we do not think the legislature intended to leave that class of borrowers which needs protection most bound and helpless in the hands of the usurer. If it had intended to exempt corporations formed under said act from the pains and penalties of usury, it doubtless would have said so. We think that the general usury law was not repealed as to this class of corporations, but only relaxed so as to allow a moderate increase of interest upon small loans owing to the labor of superintendence necessarily involved. In other words, the effect of the two statutes, when read together, is to increase the rate of interest upon loans covered by the act of 1895 and to apply the penalty of forfeiture prescribed by the usury act if the rate so authorized is exceeded. While the rate of interest was increased, the penalty for exceeding the legal rate was not done away with. In view of the history of the usury law and the general object of the legislature in passing the act of 1895, we think the foregoing

is the only reasonable and practicable construction, and without considering the other questions argued by counsel, we apply it to the case in hand by affirming the judgment below, with costs.

PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, HAIGHT and MARTIN, JJ., concur.

Judgment affirmed.

CAROLINE A. McCREADY, Respondent, v. DAVID LINDENBORN, Appellant.

LANDLORD AND TENANT — WHEN ACTION AFTER DEFAULT IN PAYMENT OF INSTALLMENTS OF RENT CANNOT EMBRACE DAMAGES FOR A TOTAL BREACH OF LEASE — MEASURE OF DAMAGES. Under a lease demising premises for a specified term at an annual rent payable in equal monthly payments in advance, and providing that if the premises should become vacant during the term the lessor might re-enter and relet them as agent of the lessee, applying the rent, first, to the payment of the expenses of re-entering and then to the payment of the rent due under the lease, the lessee to remain liable for any deficiency; and further providing that, if any default should be made in the payment of the rent, "the said hiring and the relation of landlord and tenant, at the option of the party of the first part, shall wholly cease and determine, and the party of the first part shall and may re-enter, * * * and in such case the party of the second part shall and will pay or cause to be paid to the party of the first part, as damages for the breach of the covenant for rent herein, the difference between the amount of rent hereby reserved and the amount of rents which shall be collected and received, or might with due diligence be collected and received from the said demised premises during the residue of the said term remaining unexpired at or immediately before the time of such re-entry in equal monthly payments as the amount of such difference shall from time to time be ascertained," when the lessee fails to pay the rent for a specified month and the lessor takes possession under the re-entry clause, an action does not lie for the breach of the lease in its entirety and the recovery of all damages in a single action brought before the expiration of the term, since the defendant's breach consists simply of a failure to pay in monthly installments the money damages stipulated for in the re-entry clause, to be ascertained in accordance with the agreement of the parties, and the remedy as provided therein must be exclusively followed. The plaintiff, however, may maintain an action to recover the rent, as such, for the month specified and may join with it a cause of action for the breach and may recover as dam-

N. Y. Rep.]

Statement of case.

ages the deficiency ascertained in the manner provided by the lease for each month thereafter until the commencement of the action; for any deficiency after that date she must resort to another action.

McCready v. Lindenborn, 63 App. Div. 106, affirmed.

(Argued October 27, 1902; decided November 11, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered August 7, 1901, sustaining plaintiff's exceptions ordered to be heard in the first instance by the Appellate Division and granting a motion for a new trial.

On the 9th of October, 1893, the plaintiff leased to the defendant certain premises in the city of New York for the term commencing October 1st, 1894, and ending April 30th, 1904, at the annual rent reserved of \$6,400, payable in equal monthly payments in advance. Said lease contained many covenants made by either party, and among others the following on the part of the lessee: "That if the said premises shall become vacant during the said term the said party of the first part, or her representatives, may re-enter the same, either by force or otherwise, without being liable to any prosecution therefor, and relet the said premises as the agent of the said party of the second part, and receive the rent thereof, applying the same first to the payment of such expenses as they may be put to in re-entering and then to the payment of the rent due by these presents, and the balance (if any) to be paid over to the said party of the second part, who shall remain liable for any deficiency.

"And the said party of the second part hereby further covenants that if any default be made in the payment of the said rent, or any part thereof, at the time above specified, or if any default be made in the performance of any of the covenants and agreements herein contained, the said hiring and the relation of landlord and tenant, at the option of the party of the first part, shall wholly cease and determine, and the party of the first part shall and may re-enter the said premises and remove all persons therefrom, and the said party of the

second part hereby expressly waives the service of any notice in writing of intention to re-enter as provided for in the third section of an act entitled 'An Act to abolish distress for rent and for other purposes,' passed May 13, 1846, and in such case the party of the second part shall and will pay or cause to be paid to the party of the first part as damages for the breach of the covenant for rent herein the difference between the amount of rent hereby reserved and the amount of rents which shall be collected and received, or might with due diligence be collected and received from the said demised premises during the residue of the said term remaining unexpired at or immediately before the time of such re-entry in equal monthly payments as the amount of such difference shall from time to time be ascertained."

The plaintiff alleged in her complaint the making of this lease, and that on the first of October, 1894, the keys of the building were delivered to the defendant, and were by him retained, and that she duly performed all covenants and conditions of said lease on her part; that the lessee omitted to pay the rent for the months of October and November, 1894, and that she recovered separate judgments against him for these installments; that the rent due for the month of December, 1894, was duly demanded, and payment thereof was refused, and that the defendant "has refused and continues to refuse to comply with the said lease and to perform his part of the same and to pay rent; that under the provisions of said lease the rent for that portion of the term subsequent to November, 1894, to wit, from December 1, 1894, to April 30, 1904, amounts to at least the sum of \$60,266.66 in addition to the cost of necessary repairs on said building and all water rates in excess of \$50 in each year; that the said building was altered and prepared especially for the use and occupation of the defendant by the plaintiff at a cost of over \$16,000; that by the failure and neglect of the defendant to perform his part of the said lease and to perform the covenants thereof on his part to be performed and to pay the rents, water rates and repairs as agreed, the plaintiff has been

N. Y. Rep.]

Statement of case.

compelled to expend and has expended large sums of money in the care and repair of said building and has been obliged to pay increased insurance on the same, and the plaintiff has been and is unable after diligent effort to re-let the said premises at a rent equal to that which the defendant covenanted and agreed to pay; and in consequence of the character of the alterations and improvements made especially for the said defendant and for his particular business, the plaintiff has been unable to re-let the said premises without other and further extensive alterations and repairs which said plaintiff has made at an expense of about \$4,000 in good faith and for the purpose of reducing her damages caused by the neglect and failure of the defendant to perform his part of said lease by re-letting the same at the best prices she could obtain therefor; that by reason of the matters and things aforesaid and by reason of the defendant's refusal, neglect and failure to perform his part of said lease, and by reason of defendant's breaches of the covenants of the said lease, plaintiff has been damaged to the amount of \$35,000, no part of which has been paid, although demand has been duly made as aforesaid." The only relief demanded was judgment for said sum of \$35,000 and costs.

In the first bill of particulars served by the plaintiff she specified as items of damage the rent reserved for nine years and five months, increased insurance and pay of watchman "during vacancy," amounting in all to the sum of \$60,491.80, and stated that the amount of the claim alleged in the complaint was arrived at by allowing a credit of \$25,491.80, "the estimated amount of rents that can with due diligence be obtained from said property" after paying from the gross rents "the necessary expense of restoring the property for ordinary business uses and necessary repairs and alterations for separate tenancies, expense of re-letting, etc." In the second bill of particulars, served pursuant to an order of the court, she stated that "the items of diminution of rentals are from the first of December, 1894, to the first of January, 1899," as follows: Rent of the whole building reserved for that period,

\$26,133.33, without expenses or deductions; expenses on the building aside from taxes, water rates not exceeding \$50 a year, repairs to streets and sidewalks, roof girders and outer walls and ordinary fire insurance, \$11,774.01; gross rents received, \$22,663.50, less said expenses, \$11,774.01, leaving actual diminution in rentals, \$15,243.84 to January 1st, 1899.

This action was commenced on the 12th of September, 1898, and upon the trial the plaintiff read in evidence said lease and the judgment rolls in the actions for the rent of October and November, 1894, proved that the premises were vacant and that she placed them in the hands of real estate brokers for rental. It was conceded that in December, 1894, without resorting to force or to legal proceedings, she took possession under the clause of the lease relating to re-entry. She offered to prove the damages alleged in the complaint and bills of particulars, as well as other items as to which she had not been ordered to furnish specifications, but she was not allowed to give any evidence upon the subject, apparently because the trial justice thought that her only cause of action was on the covenant to pay any deficiency which might arise, and that the complaint was not sufficient to permit a recovery on that ground. The complaint was accordingly dismissed, but the exceptions of the plaintiff were ordered to be heard in the first instance at the Appellate Division, where, by a divided vote, they were sustained and a new trial was ordered, upon the ground that the action was brought to recover in one action the entire damages for a total breach of the lease, and that the plaintiff was not precluded from maintaining it either by the covenants of the lease or by the recovery of the two judgments, and that the service of the bills of particulars did not prevent her from proving the damages sustained. The defendant appealed to this court, giving the usual stipulation.

Morris J. Hirsch for appellant. The complaint was properly dismissed. (*Morgan v. Smith*, 70 N. Y. 537; *McAdam on Landl. & Ten.* 142; *Underhill v. Collins*, 132 N. Y.

N. Y. Rep.]

Opinion *Per Curiam*.

269; *Gaffney v. Paul*, 95 N. Y. S. R. 173; *Gray v. K. D. & I. C. Co.*, 162 N. Y. 388; *Hall v. Gould*, 13 N. Y. 127; *Matter of Hevenor*, 144 N. Y. 271; *People v. St. Nicholas Bank*, 151 N. Y. 592; *Matter of Ludeke*, 33 App. Div. 397; *Hackett v. Richards*, 13 N. Y. 138.) The parties having by their contracts fixed a means of measuring their respective damage in the event of a breach, cannot now estimate those damages in any other manner. (*Watson v. Russell*, 149 N. Y. 388.)

W. P. Prentice for respondent. Plaintiff's right to a judgment for all damage sustained by reason of defendant's breach of the lease and repudiation of all obligations under it should be affirmed. (*McCready v. Lindenborn*, 63 App. Div. 111; *Howard v. Daly*, 61 N. Y. 362; *Taylor v. Bradley*, 39 N. Y. 129; *Driggs v. Dwight*, 17 Wend. 71; *Hall v. Gould*, 13 N. Y. 127; *Wakeman v. W. & W. Mfg. Co.*, 101 N. Y. 209; *Underhill v. Collins*, 132 N. Y. 269; 3 Pars. on Cont. 189; *Beach v. Crain*, 2 N. Y. 89; *Schell v. Plumb*, 55 N. Y. 592.) The defendant having refused to perform the contract cannot now take advantage of the terms of the contract which provide for a totally different situation. (3 Pars. on Cont. 189.) The plaintiff had a right to go to the jury upon the questions of the amount of damages. (*U. S. T. Co. v. O'Brien*, 143 N. Y. 284; *Trull v. Granger*, 8 N. Y. 115; *Eastman v. Mayor, etc.*, 152 N. Y. 468; *Wakeman v. W. & W. Mfg. Co.*, 101 N. Y. 209.)

Per Curiam. While the complaint is indefinite and the theory of the pleader uncertain, no motion appears to have been made to correct these defects, and if the plaintiff was entitled to recover anything according to a reasonable construction of her complaint, it should not have been summarily dismissed, but she should have been permitted to put in her evidence. The complaint and bills of particulars, when read together, set forth one cause of action for the non-payment of the rent reserved for the month of December, 1894, and

another for breach of the covenant to pay any deficiency in case of re-entry for condition broken. An effort was made to set forth a third cause of action for a total breach of the lease, but without success. While the object of the pleader was to recover all the damages in a single action brought before the expiration of the term, it does not follow that because she cannot recover all she may not recover any.

The rent for the month of December, 1894, was payable in advance, and, hence, became due before she re-entered the premises, and while the lease was in full force. She distinctly alleges demand of the rent under the lease for that month, and that the defendant refused to pay it. The right of action upon the covenant broken prior to re-entry survived that act, and the plaintiff was, at least, entitled to recover rent, as such, for the month named.¹

This conclusion requires an affirmance, for if the plaintiff is entitled to recover at all the order of the Appellate Division sustaining her exceptions and granting a new trial must be affirmed, and judgment absolute rendered against the defendant in accordance with his stipulation. As, however, there must be an assessment of damages by a sheriff's jury or a referee, we make some further suggestions in aid of the investigation that is still necessary.

When the plaintiff re-entered under the defeasance clause no further rent, as such, could accrue, for the lease proper was at an end, and the relation of landlord and tenant no longer existed. (*Hall v. Gould*, 13 N. Y. 127; *Michaels v. Fishel*, 169 N. Y. 381, 387.) While the recovery of judgments for rent recognized the lease as existing up to the time when the last judgment was entered, and thus waived the right to re-enter for any covenant then broken, it constituted no waiver of the rights springing from breaches subsequently made. (*Jackson v. Allen*, 3 Cow. 226, 230; *Woodfall's Landlord & Tenant*, 324; *Wood's Landlord & Tenant*, 455.)

One unbroken covenant survived re-entry, because it provided expressly for that contingency by authorizing the lessor to relet the premises and requiring the lessee to pay any

deficiency in equal monthly payments as the amount thereof should, from month to month, be ascertained by deducting from the rent reserved the rents received, less the expense of such repairs as the tenant covenanted to make and less also, as is reasonably to be implied from authority to relet, the reasonable expenses of reletting and collecting. By the express contract of the parties a separate and independent cause of action arose under this covenant every month when there was a deficiency ascertained in the manner provided. The plaintiff was at liberty to allow the causes of action for monthly deficiency to accumulate and to recover upon several at the same time, but she could not recover any deficiency until it had actually accrued and had been ascertained in the mode provided by the covenant. The defendant agreed to pay "as damages for the breach of the covenant for rent" the difference between the rent reserved and the rent received "in equal monthly payments as the amount of such difference shall from time to time be ascertained." Aside from the rent accruing prior to re-entry, the plaintiff could recover only on this covenant, and hence she was entitled to no damages except such as had accrued and were due and payable at the time the action was commenced. She could not even recover any deficiency accruing after the commencement of the action and before the trial thereof, because such damages had not been ascertained as required by the contract at the time the action was commenced, and hence were not then due and payable.

While we do not wish to conclude the parties in advance, we suggest that so far as we can see from the facts now before us, the measure of the plaintiff's recovery in this action is, *first*, the rent, as such, for the month of December, 1894; *second*, the deficiency, ascertained in the manner above stated, for each month thereafter until the action was commenced. For any deficiency accruing after that date she must resort to another action since the contract in effect so requires. She is not entitled to any part of the amount paid to fit up the premises as agreed in the lease for the special use of the

defendant, because if he had paid his rent as it became due she could have recovered no part of that sum, and his failure to pay rent did not make him liable for something which he had never agreed to pay. She should receive the equivalent of what she would have had if the tenant had paid as he agreed, and no more. The covenant creates and limits the liability of the defendant, and hence the plaintiff cannot recover the expense of making extensive alterations in order to relet the premises to advantage; nor can she deduct the amount paid for this purpose from the gross rents reserved, because the covenant does not so provide, and she can recover only as the covenant permits. While it is possible that she could have leased the premises, subject to reasonable alterations to be made by the tenant, she could not make the alterations herself and deduct the expense from the rents received before crediting them upon the rents reserved, for that would require a special agreement not to be found in the lease before us. She must stand on the covenant as made and cannot ask the courts to add provisions, however reasonable, which she failed to have inserted before the lease was signed.

We do not sustain the theory upon which the majority of the learned judges of the Appellate Division proceeded to judgment, to wit, that an action will lie for the breach of the lease as an entirety and the recovery of all the damages in a single action brought before the expiration of the term. The breach of an agreement to pay money in installments is not a breach of the entire contract and will not permit a recovery of all the damages in advance. (*Wharton & Co. v. Winch*, 140 N. Y. 287; *Moore v. Taylor*, 42 Hun, 45.) So far as appears, the failure to pay the rent was the only breach of which the defendant was guilty, for he was under no legal obligation to occupy the demised premises. Even if he refused to recognize the lease as in force, because, as he claimed, the plaintiff failed to make the alterations provided for, this was not a violation of any covenant that he had entered into. His breach consisted simply of a failure to pay money in monthly installments. In *Wharton & Co. v. Winch* (*supra*) it was held

N. Y. Rep.]

Opinion *Per Curiam*.

that where a contract for railroad construction provides for payment in installments as the work progresses, a failure to pay an installment when due is not such a breach of the entire contract as to authorize the contractor to refuse to proceed further and to recover the profits which he would have earned had the contract been fully performed. So if a mortgagor refuses to pay the installments as they fall due upon a mortgage given by him, and even if he refuses to recognize the mortgage as in force for some reason, the mortgagee cannot, in the absence of a special provision permitting it, call the whole mortgage due upon the ground of an entire breach.

There seems to be a distinction, whether well grounded in principle or not, between a contract for the payment of money in future installments and a contract for the delivery of goods in future installments (*Nichols v. Scranton Steel Company*, 137 N. Y. 471), as well as a contract for future employment and service. (*Howard v. Daly*, 61 N. Y. 362.) We think that the contract before us should be governed in this respect by the principle laid down in *Wharton & Co. v. Winch* (*supra*). Aside from this, however, when the parties by their contract provide for the consequences of a breach, lay down a rule to admeasure the damages and agree when they are to be paid, the remedy thus provided must be exclusively followed.

The order of the Appellate Division should be affirmed, and judgment absolute ordered against the defendant upon his stipulation, with costs.

GRAY, O'BRIEN, MARTIN, VANN, CULLEN and WERNER, JJ., concur; PARKER, Ch. J., absent.

Ordered accordingly.

172 410
 78 AD 220
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 e 78 AD 392

JOHN McNULTY, Appellant, v. THE MOUNT MORRIS ELECTRIC
 LIGHT COMPANY, Respondent.

INJUNCTION TO RESTRAIN NUISANCE TO LEASEHOLD — EXPIRATION OF LEASE BEFORE TRIAL — DEFENDANT ENTITLED TO JURY TRIAL. When an action by a lessee for an injunction to restrain a nuisance, to which has been joined as a mere incident and to avoid multiplicity of suits a legal claim for damages, is, by the expiration of the lease and the vacation of the premises prior to the trial, shorn of all its equitable features, leaving nothing but the claim for damages, the defendant is entitled to a trial by jury unless it has been waived.

McNulty v. Mt. Morris El. Light Co., 56 App. Div. 9, modified.

(Argued October 9, 1902; decided November 18, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 21, 1900, upon an order reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and dismissing the complaint.

The nature of the action and the facts, so far as material, are stated in the opinions.

Frank M. Hardenbrook and *Charles H. Wenzell* for appellant. The dismissal of the plaintiff's complaint by the Appellate Division was erroneous. (*Heller v. Cohn*, 154 N. Y. 299; *Benedict v. Arnoux*, 154 N. Y. 715; *Griffin v. Marquardt*, 17 N. Y. 28; *Schenck v. Dart*, 22 N. Y. 420; *Cuff v. Dorland*, 57 N. Y. 560; *Snyder v. Seaman*, 157 N. Y. 449; *New v. Vil. of New Rochelle*, 158 N. Y. 43; *Howells v. Hettrick*, 160 N. Y. 308; *Ross v. Caywood*, 162 N. Y. 262; *Lopez v. Campbell*, 163 N. Y. 340.) The loss of plaintiff's right to equitable relief did not deprive plaintiff of the right to have his case tried at Special Term. (*Van Allen v. N. Y. El. R. Co.*, 144 N. Y. 174; *Koehler v. N. Y. El. R. Co.*, 159 N. Y. 218; *Lyle v. Little*, 28 App. Div. 181.) The judgment of the Special Term should be affirmed. (*Heller v. Cohn*, 154 N. Y. 299; *Benedict v. Arnoux*, 154 N. Y. 715; *Queen v. Weaver*, 166 N. Y. 398; *Van Beuren v. Wotter-*

N. Y. Rep.] Opinion of the Court, per PARKER, Ch. J.

spoon, 164 N. Y. 368; *Snyder v. Seaman*, 157 N. Y. 449; *Hirschfeld v. Fitzgerald*, 157 N. Y. 166; *Ross v. Caywood*, 162 N. Y. 262; *Lopez v. Campbell*, 163 N. Y. 340.)

Henry J. Hemmens and *Samuel A. Beardsley* for respondent. The Appellate Division was warranted in reversing the judgment and dismissing the complaint. (Code Civ. Pro. § 1022; *Husted v. Thomson*, 158 N. Y. 328; *Bradley v. Aldrich*, 40 N. Y. 504; *Hawes v. Dobbs*, 137 N. Y. 465; *Dudley v. Congregation*, 138 N. Y. 451; *Howells v. Hettrick*, 160 N. Y. 308; *Ross v. Caywood*, 162 N. Y. 259; *Muldoon v. Pitt*, 54 N. Y. 269; *Guernsey v. Miller*, 80 N. Y. 181; *Mansfield v. Mayor, etc.*, 165 N. Y. 208; *New v. Vil. of New Rochelle*, 158 N. Y. 41.) The learned justice at Special Term erred in retaining jurisdiction of the case for the purpose of awarding damages. (*Van Deventer v. Van Deventer*, 32 App. Div. 578; *Beck v. Allison*, 56 N. Y. 372; *Wheelock v. Lee*, 74 N. Y. 495; *Hudson v. Caryl*, 44 N. Y. 553; *Green v. Stewart*, 19 App. Div. 202; *Mittenthal v. Rabinowitz*, 60 App. 138; *Glenn v. Lancaster*, 109 N. Y. 641; *Ackerman v. True*, 56 App. Div. 54; *Rosenheimer v. S. G. L. Co.*, 39 App. Div. 482; *Bradley v. Aldrich*, 40 N. Y. 504.) The learned court erred in not striking the case from the calendar and granting the motion which was made by defendant's counsel at the opening of the case. (*Ostrander v. Conkey*, 20 Hun, 421; *Gair v. Birmingham*, 20 Civ. Pro. Rep. 233; *Yates v. McAdam*, 18 Misc. Rep. 295; *Romaine v. Bowdoin*, 70 Hun, 366; *Ziegler v. Trenkman*, 31 App. Div. 305; *Leonard v. Faber*, 31 App. Div. 137; Code Civ. Pro. § 968; *Prichard v. N. Ins. Co.*, 38 App. Div. 109; *Haskin v. Murray*, 29 App. Div. 370.)

PARKER, Ch. J. I agree with Judge BARTLETT's conclusion that there should be a new trial in this action, but differ with him in so far as he holds that the trial court did not err in refusing to grant defendant's motion to have the action tried on the common-law side of the court.

It appeared when this case was moved for trial that the

plaintiff was not then entitled to equitable relief, although he was so entitled at the time of the commencement of the suit. It is undoubtedly the rule and long has been that when equity takes jurisdiction it will draw to itself all matters necessary to a final disposition of the controversy, as where an injunction is granted, if damages have resulted by reason of the acts restrained, equity will admeasure and award the damages as part of the relief. But while equity has this power it will not exercise it for the purpose of depriving a litigant of his right of trial by jury — “the fundamental guaranty of the rights and liberties of the people” — when the question of damages is the only question presented for decision. Courts are jealous in protecting this great right instead of seeking opportunities for depriving litigants of it. This action was properly brought on the equity side of the court, but before the cause was reached for trial plaintiff had passed out of the possession of the property, thus parting with the right to the injunction, and there remained to him only his claim for damages. For that reason defendant’s motion to have the action tried before a jury should have been granted.

The authorities cited in support of the contrary position do not in my judgment sustain it. The first is *Van Allen v. N. Y. E. R. R. Co.* (144 N. Y. 174), brought by the owner of premises abutting on a street through which an elevated road ran, to restrain the operation and maintenance of the road and for damages. Plaintiff sold the premises before the trial and thereby parted with his right to an injunction, leaving only the question of damages. Counsel for both parties, however, stipulated that the action be sent to a referee to determine all the issues. It was not until the action came on before the referee that defendant attempted to raise the point that he was entitled to have the question of damages submitted to a jury. It was then too late. As this court said (page 178): “The defendants were not entitled to a jury trial, for the reason that they had waived it by consenting that the claim for damages should be referred with the claim for an injunction, and the fact that the latter had been transferred to

N. Y. Rep.] Opinion of the Court, per PARKER, Ch. J.

another by the conveyance, at the trial or during the pendency of the action, did not deprive the referee of jurisdiction so long as any cause of action remained. The right of trial by jury having been waived, there was no longer any question except whether the trial should be had in a court of law or a court of equity, and, since both remedies are now administered by the same court and under the same procedure, the defendants' contention related to forms and not to matters of substance, and was not material."

The next case cited is *Valentine v. Richardt* (126 N. Y. 272), in which plaintiff sought to set aside the conveyance made to defendant Richardt on the ground that it was fraudulent and void as against him, and upon the trial it was held to be fraudulent and void, but the court could not vest title in plaintiff because Richardt had sold the land to a purchaser in good faith. The conclusion, however, was reached that a court of equity could require Richardt to turn over to plaintiff the money he had received for the land, inasmuch as he had put it out of his power to convey the land. In this court it was said: "The fraudulent conveyance which the defendant obtained from the owner of the land enabled him to sell it to a purchaser in good faith, and the money that he received therefor, with the interest thereon, can, for all the purposes of this case, be considered in equity as the land itself." It is apparent from the decision, therefore, that this case is not an authority on the proposition, and it should also be noted that no such question was raised by motion or otherwise either before or at the trial.

In the next case cited (*Koehler v. N. Y. E. R. R. Co.*, 159 N. Y. 218) the grantee of the original plaintiff was brought in as a party plaintiff before trial, and, though the defendant opposed the order joining him as plaintiff, no motion was made to go to the jury until the trial. This court said (Judge BARTLETT writing): "It thus appears that the question of defendant's strict right to a jury trial in a case where seasonable application had been made was not presented for adjudication." Also: "The presence of the present owner as plain-

tiff preserves the equitable features of the case and permits the court, sitting in equity, to retain jurisdiction."

Henderson v. N. Y. C. R. R. Co. (78 N. Y. 423) holds simply that when a court of equity grants an injunction it may also grant with it the incidental relief of damages. All the land abutting on the street had been sold, but the court enjoined the defendant railroad from using the street until it had acquired plaintiff's title thereto. The court alluded to the question of plaintiff's right to recover the damages accrued to the property sold, but said that question "has not been raised upon this appeal, nor was any objection made upon that ground before the referee; we are not, therefore, embarrassed by it."

When an equitable suit for an injunction, to which has been joined, as a mere incident and to avoid multiplicity of suits, a legal claim for damages, is, by plaintiff's conveyance of the land, shorn of all its equitable features, leaving nothing but a legal claim for damages, the right to a trial by jury cannot be denied unless it has been waived, as was done by the defendant in *Pegram v. N. Y. E. R. R. Co.* (147 N. Y. 135), where the court said: "Had the objection been raised in a proper way or at the proper time, I think the defendants could have insisted upon a trial upon the law side of the court. * * * But not having done so, it was not error" for the court, sitting in equity, to assess the damages.

So far I have considered this matter as if the inquiry were whether in every action brought to secure equitable relief the court should on motion send the case to a jury for trial, upon its appearing that the right to equitable relief had passed away after the commencement of the suit. And I shall conclude in that vein. But the fact should not be lost sight of that in cases of this character, viz., actions to abate a nuisance and recover the damages occasioned thereby, trial by jury is a matter of right for the defendant, even if the complaint is in form as for equitable relief against the continuance of a nuisance, the prayer for damages being incidental thereto. And this is so, because, prior to the adoption of the Constitu-

N. Y. Rep.] Opinion of the Court, per PARKER, Ch. J.

tion, the existence of an alleged nuisance and the amount of damages were both submitted to a jury for decision, and, hence, the constitutional guaranty of trial by jury applies to such an action as one of the "cases in which it has been heretofore used." (*Hudson v. Caryl*, 44 N. Y. 553; *Cogswell v. N. Y., N. H. & H. R. R. Co.*, 105 N. Y. 319.)

The two cases from the United States Supreme Court which have been cited (*Beedle v. Bonnett*, 122 U. S. 71; *Clark v. Wooster*, 119 U. S. 325) do hold that in actions in United States courts for an injunction and damages for the infringement of patents, the fact that by the expiration of the patent the ground for an injunction has disappeared, does not preclude the court sitting in equity from granting the incidental relief of damages. But the reason for this rule in the United States courts is plain. Though the same courts have cognizance of both equitable and legal causes the practice and the pleadings are entirely different for each class of cases and if a proceeding brought on the equity side of the court is not one of equitable cognizance, the cause must be dismissed and a new proceeding must be instituted at law. (*Hipp v. Babin*, 60 U. S. 271; *Fenn v. Holme*, 62 U. S. 481; *Thompson v. Railroad Companies*, 73 U. S. 134; *Killian v. Ebbinghaus*, 110 U. S. 568; *Scott v. Neely*, 140 U. S. 106; *Hollins v. Brierfield C. & I. Co.*, 150 U. S. 371.) In *Thompson v. Railroad Companies* the court said: "Has a court of equity jurisdiction over such a case as is presented by this record? If it has not, the decree of the court below must be reversed, the bill dismissed and the parties remitted to the court below to litigate their controversy in a court of law. * * * The Constitution of the United States and the acts of Congress recognize and establish the distinction between law and equity. The remedies in the courts of the United States are, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles. And although the forms of proceedings and

practice in the state courts shall have been adopted in the Circuit Courts of the United States, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit.'"

It appears, therefore, that while in our Supreme Court equitable and legal relief are possible under the same pleadings and a strict enforcement of the rule that makes actions at law triable by jury would, in a case like the one at bar, result in no hardship, but would only entail a shifting of the cause from the equity to the law side of the court, the trial proceeding there on the same pleadings, in the United States courts the strict enforcement of the rule would necessitate the dismissal of the proceedings and the plaintiff would be forced to begin a new action at law or abandon his cause. It seems plain to me, therefore, that the United States courts have adopted the practice disclosed by the two cases cited in order to avoid multiplicity of suits and to save both parties from the hardship of resorting to another action for the decision of their controversy in a case where, when the suit was begun, plaintiff was entitled to equitable relief. And, hence, this court is not warranted in following the practice of the United States courts in this respect, thereby abandoning its own settled practice, which is not only workable, but more nearly conforms to the letter and spirit of the constitutional provision guaranteeing trial by jury.

It follows, therefore, that the denial of defendant's motion for a jury trial in this case was error.

The judgment should be so modified as to grant a new trial, and as so modified affirmed, costs in all courts to abide the event.

BARTLETT, J. The plaintiff brought this action for an injunction and damages against the defendant, The Mount Morris Electric Light Company. The plaintiff was the tenant of No. 525 Greenwich street, in the city of New York, and the defendant's plant was adjacent thereto.

The complaint alleges, in substance, that the defendant so

negligently constructed and conducted the property and operated the machinery therein as to discharge upon the premises of the plaintiff great quantities of soot, cinders, ashes and noisome gases, unpleasant odors, water and steam; also causing incessant noises and very great jar and vibration, etc., affecting the health and peaceable enjoyment of the occupants.

At the time this action was begun the plaintiff was in occupancy of the premises under his lease, but when the trial commenced his lease had expired and he had moved out.

Prior to the trial the defendant made a motion for leave to serve an amended and supplemental answer, which was granted. This answer was duly served, setting up the expiration of the lease and the vacation of the premises.

The cause coming on for trial at Special Term, on the equity side of the court, the defendant moved that it be stricken from the calendar, upon the ground that the issue remaining could not be tried; that the plaintiff asks for an injunction; that inasmuch as he is not now in possession of the property he is not entitled to an injunction; that the action is, therefore, a common-law action for damages and not an action for an injunction, and not an action over which equity has any jurisdiction.

The trial judge denied this motion, and after the introduction of evidence by both parties, rendered judgment in favor of the defendant, to the effect that the plaintiff having removed from the premises prior to the trial is not entitled to an injunction, but that the court could, notwithstanding, retain jurisdiction of the action for the purpose of assessing plaintiff's damages; that he is entitled to judgment for \$1,189.05 damages, together with interest, costs and an extra allowance of five per centum.

The learned Appellate Division reversed this judgment upon the law and the facts, and dismissed the complaint, with costs, which were taxed at \$358.42. This judgment is now before us for review.

The Appellate Division held, in substance, that the trial judge had no jurisdiction, after the vacation of the premises, to try the cause and dismiss the complaint as stated.

We are of opinion that the ruling of the trial judge was proper and the Special Term had jurisdiction of the cause. It is well settled that the jurisdiction of a court of equity depends upon the position of the plaintiff and the relief he is entitled to at the time of the bringing of his action, and if the jurisdiction has once attached it is not affected by subsequent changes so long as any cause of action survives, although for that there may be an adequate remedy at law. (*Van Allen v. N. Y. El. R. R. Co.*, 144 N. Y. 174, and cases cited; *Valentine v. Richardt*, 126 N. Y. 272; *Koehler v. N. Y. El. R. R. Co.*, 159 N. Y. 223; *Henderson v. N. Y. C. R. R. Co.*, 78 N. Y. 423; *Beedle v. Bennett*, 122 U. S. 71, 75; *Clark v. Wooster*, 119 U. S. 322, 325, and cases cited at latter page.)

The additional point is made that this action is for a nuisance and governed by section 968 of the Code of Civil Procedure. That section reads as follows: "In each of the following actions, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is directed :

"1. An action in which the complaint demands judgment for a sum of money only.

"2. An action of ejectment; for dower; for waste; for a nuisance; or to recover a chattel."

In *Cogswell v. N. Y., N. H. & H. R. R. Co.* (105 N. Y. 319) this court held that actions like the one before us are not governed by this section. In the case cited the complaint demanded both legal and equitable relief. It prayed judgment for damages and an abatement of the nuisance complained of, and also for an injunction restraining the defendant from continuing the nuisance and from permitting its lands to be used for the purpose of carrying on any operations thereon which would injure the plaintiff in the enjoyment of her property. Judge ANDREWS said: "This is not, we think, an action for a nuisance within section 968 of the Code of Civil Procedure. The action of nuisance is mentioned in the section together with other common-law actions, all of which must, the section declares, be tried by a jury, unless a jury is waived or a reference is directed. Reading the section in connection with section 1660 it is clear, we think, that an equitable action to

restrain the continuance of a nuisance demanded is not an action for a nuisance within section 968."

In *Olmsted v. Rich* (25 N. Y. State Repr. 271, 275) Judge MEEWIN, commenting upon the case last cited, said: "In *Cogswell v. N. Y., N. H. & H. R. R. Co.* (105 N. Y. 319) it was very distinctly stated that an action like the present one was not within section 968. And although the facts of that case did not apply the rule to the case of a defendant, still the rule was broadly enunciated and should be followed by this court."

We are of opinion that this rule should be applied to both the plaintiff and defendant, as it is clear that the present case is not contemplated by section 968, and is not distinguishable from actions in equity to restrain the operation of an elevated railroad and for damages, in which the latter is merely incidental and alternative and the defendant is not entitled to a jury trial in fixing the amount.

We are also of opinion that the dismissal of the complaint cannot be sustained.

In a recent case this court referred to the settled rule which is established by a long line of authorities, as follows: "The Appellate Division, upon reversing a judgment of the trial court, where there was an issue of fact, cannot render final judgment in favor of the appellant, but must grant a new trial unless the facts are conceded, or are established by written instruments, or are found in full by the trial judge, or the evidence is not only undisputed, but diverse inferences cannot be drawn therefrom, and it is manifest that no evidence can be produced which will entitle the respondent to recover." (*Ross v. Caywood*, 162 N. Y. 262. See, also, *Astor v. L'Amoureux*, 8 N. Y. 107; *Edmonston v. McLoud*, 16 N. Y. 543; *Schenck v. Dart*, 22 N. Y. 420; *Cuff v. Dorland*, 57 N. Y. 560, 564; *Whitehead v. Kennedy*, 69 N. Y. 462, 468; *Snyder v. Seaman*, 157 N. Y. 449; *New v. Village of New Rochelle*, 158 N. Y. 43; *Lopez v. Campbell*, 163 N. Y. 340.)

The findings of the trial judge are based upon a sharp conflict of evidence and the dismissal of the complaint was clearly error under the above rule.

The appellant insists that if we reverse the judgment of the Appellate Division a new trial ought not to be ordered, but the judgment of the Special Term should be affirmed.

This contention cannot be sustained on the facts as presented by this record. At the trial the evidence was conflicting, and it cannot be said that there was no evidence warranting the reversal of the Special Term judgment.

In *Otten v. Manhattan Railway Co.* (150 N. Y. 395, 400) the rule governing this situation is discussed by Judge VANN. After pointing out that this court has no power to review a question of fact in a civil case, that our jurisdiction is limited both by the Constitution and statute to questions of law, and that where the Appellate Division affirms unanimously upon the facts, we cannot look into the record to ascertain if there is evidence sustaining the findings, he says:

"When the Appellate Division reverses upon the facts there is no constitutional inhibition, and a question of law arises as to whether there was any evidence to support the view of that court. If it appears that there was any material and controverted question of fact, the decision thereof by the Appellate Division is final. * * * Whether there is a question of fact in the case is always a question of law, depending possibly upon a conflict of evidence and possibly upon conflicting inferences which may be drawn from uncontradicted evidence. Unless there was a material question of fact the reversal was an unlawful exercise of judicial power, and constituted an error which may be corrected by this court." (*Edson v. Bartow*, 154 N. Y. 199, 217.)

As the Appellate Division dealt with a question of conflicting evidence, we cannot review its decision on the facts.

The judgment appealed from should be so modified as to order a new trial, the costs at Special Term and in the Appellate Division to abide the event, and as so modified affirmed. The costs in this court should also abide the event.

HAIGHT, VANN, CULLEN and WERNER, JJ., concur with PARKER, Ch. J.; O'BRIEN, J., concurs with BARTLETT, J.

Judgment accordingly.

In the Matter of the Application of THOMAS ALLISON, as Commissioner of Jurors in the County of New York, Appellant, to Compel the Delivery to him of the Books and Papers Belonging to Such Office and Now in Possession of CHARLES WELDE, Respondent.

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NEW YORK (COUNTY OF), COMMISSIONER OF JURORS IN—CHAPTER 602 OF LAWS OF 1901 AUTHORIZING APPOINTMENT OF, BY APPELLATE DIVISION NOT VIOLATIVE OF SECTION 2 OF ARTICLE 10 OF CONSTITUTION. Chapter 602 of the Laws of 1901, providing "for the appointment of a commissioner of jurors in each county of the state having a population of one million or more, according to the last preceding census, who shall be appointed by the justices of the Appellate Division of the Supreme Court in the department in which such county is situated, or a majority of them," which conflicts with and repeals prior statutes creating and providing for a commissioner of jurors in the city of New York, does not violate section 2 of article 10 of the Constitution, providing that "All city, town and village officers, whose election or appointment is not provided for by this Constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the Legislature shall designate for that purpose. All other officers, whose election or appointment is not provided for by this Constitution, and all officers, whose offices may hereafter be created by law, shall be elected by the people, or appointed, as the Legislature may direct." The act is a valid exercise of legislative power, because it abolishes the office of commissioner of jurors of the city of New York, which office, not having been provided for by the Constitution, the legislature had the power to abolish, and, so far as the county of New York is concerned, creates a new office after the adoption of the Constitution, viz., a commissioner of jurors of the county of New York, whose functions are to be exercised therein, not in the city, and whose expenses and compensation are made a county charge; the office, therefore, may be filled by election or by appointment in such manner "as the legislature may direct." Such legislation is justified by reason of the enlargement of the city so as to embrace other counties than the county of New York, and it is for the legislature to distribute the powers of local government, as between the city and the county governments, as it may deem best, and this discretion, when not restrained or excluded by some provision of the Constitution, is absolute.

Matter of Allison v. Welde, 72 App. Div. 629, reversed.

(Argued October 7, 1902; decided November 18, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered June 27, 1902, which affirmed an order of Special Term denying an application for the delivery of books and papers made pursuant to section 2471a of the Code of Civil Procedure.

The facts, so far as material, are stated in the opinion.

Albert B. Boardman for appellant. The appellant is a county officer. (*Matter of Brenner*, 67 App. Div. 375; 170 N. Y. 185.) Prior to the act of 1901 there never was in the county of New York any such county officer as a commissioner of jurors. Not only is the petitioner the first county officer who has ever been called commissioner of jurors in the county of New York, but he is the first county officer who has ever been authorized to exercise the functions, or any of the functions, of commissioner of jurors therein. (*People ex rel. v. Dunlap*, 66 N. Y. 162; *Taylor v. Mayor, etc.*, 67 N. Y. 87.) The legislature at all times has had, and now has, the power to make the office of commissioner of jurors either a city or county office. If the duties of commissioner of jurors have been performed by a city officer, his office may be abolished by the legislature at any time, and the office of a county commissioner of jurors may be created. (*People ex rel. v. Dunlap*, 66 N. Y. 162.) The office now filled by the petitioner is a new office, which did not exist at the time of the adoption of the Constitution of 1894; and being a new office there is no constitutional inhibition against its being filled in such manner as the legislature may direct. (*People v. Draper*, 15 N. Y. 532; *W. W. Mfg. Co. v. Shanahan*, 128 N. Y. 345; L. 1873, ch. 613; L. 1874, ch. 329; L. 1895, ch. 934; *People ex rel. v. Bd. of Suprs.*, 147 N. Y. 1; *McGrath v. Grout*, 171 N. Y. 7; *Adams v. E. R. S. Inst.*, 136 N. Y. 52; Const. of N. Y. art. 10, § 2; *People v. Pinckney*, 32 N. Y. 377; *Fire Dept. v. Steamship Co.*, 106 N. Y. 566.) Chapter 602 of the Laws of 1901 was not passed for the purpose of evading the Constitution. (*People v. Hall*, 169 N. Y. 184; L. 1896, ch. 378, § 19; L. 1901, ch.

N. Y. Rep.]

Points of counsel.

602, § 8.) The office of commissioner of jurors under chapter 602, Laws of 1901, is a county office. Prior to the passage of that act it was not a county, but was either a city office or an office of two boroughs together, Manhattan and the Bronx. (*Matter of Brenner*, 170 N. Y. 185; *People ex rel. v. Dunlap*, 66 N. Y. 162; *Taylor v. Mayor, etc.*, 67 N. Y. 87.) The distribution of the functions of local government, as between city and county governments, is within the absolute power and discretion of the legislature, except where the function is by constitutional provision vested in a city or county officer, and a change by the legislature of an office or function from a city to a county government is not a mere change in name, but is legally a fundamental and substantial change. (*People ex rel. v. Taylor*, 66 N. Y. 162; *Taylor v. Mayor, etc.*, 67 N. Y. 87; *Matter of Brenner*, 170 N. Y. 192; *McGrath v. Grout*, 69 App. Div. 314; *People v. Draper*, 15 N. Y. 532.) This court will not hold an act of the legislature unconstitutional unless it violates the prohibitions of the Constitution in express words or by necessary implication. Mere inference or analogy will not suffice as grounds for declaring an act unconstitutional. (*People v. Draper*, 15 N. Y. 532; *W. W. Mfg. Co. v. Shanahan*, 128 N. Y. 345; *People ex rel. v. Dunlap*, 66 N. Y. 162; *Taylor v. Mayor, etc.*, 67 N. Y. 87; *People v. Pinckney*, 32 N. Y. 392.)

Robert H. Elder for respondent. At the time the present Constitution went into effect, and at the time of the enactment of chapter 602 of the Laws of 1901, the office of the commissioner of jurors was "distinctly a city office" of the city of New York. (L. 1873, ch. 335, § 25; *People ex rel. v. Dunlap*, 66 N. Y. 162, 168; *Taylor v. Mayor*, 67 N. Y. 87, 93.) By chapter 602 of the Laws of 1901, the legislature did not change the character or scope of the functions and duties of this office, and did not abolish the office, but left them substantially as they existed theretofore. (L. 1901, ch. 602; Code Civ. Pro. § 1089; *People v. Dunn*, 157 N. Y. 528; *Matter of Brenner*, 170 N. Y. 185.) Section 2 of article 10

of the Constitution has preserved to the cities and other localities of the state the control of all the official functions of which they were possessed when the Constitution went into effect. (*Devoy v. City of New York*, 36 N. Y. 449; *People v. Raymond*, 37 N. Y. 428; *People v. Pinckney*, 32 N. Y. 377; *People v. Albertson*, 55 N. Y. 51; *Board of Health v. Heister*, 37 N. Y. 665; *People v. Draper*, 15 N. Y. 532.) Chapter 602 of the Laws of 1901 seeks to vest in a state authority control of functions preserved by the Constitution to the people of Manhattan and the Bronx, and therefore violates section 2 of article 10 of that document. (*Matter of Brenner*, 170 N. Y. 185.)

HAIGHT, J. On the 10th day of April, 1902, Thomas Allison, the appellant, was appointed commissioner of jurors for the county of New York by the justices of the Appellate Division of the department in which that county is located. He thereupon qualified by taking the oath of office required by the Constitution, and then demanded of Charles Welde, who was in possession of the books and papers belonging or pertaining to the office, the possession thereof, which demand was refused upon the ground that chapter 602 of the Laws of 1901, under which Allison had been appointed, was unconstitutional, and, therefore, void.

The statute in question became a law on the 22d day of April, 1901. It provided that there should be a commissioner of jurors in each county of the state having a population of one million or more, according to the last federal census, who shall be appointed by the justices of the Appellate Division of the Supreme Court in the department in which the county is situated, or by a majority of them. The act also contains specific provisions defining the power and duties of the commissioner, and then concludes by repealing all special or general laws inconsistent with the provisions of the act.

The office of commissioner of jurors in the city of New York was first created by the Laws of 1847, chapter 495. Under the provisions of that act, supervisors of the city, justices

of the Superior Court and the justices of the Court of Common Pleas of the county were required to appoint the commissioner, whose powers and duties were specified by the other provisions of the act. In 1873, by chapter 335, section 25, entitled "An act to reorganize the local government of the city of New York," it was provided that the mayor shall nominate, and, by and with the consent of the board of aldermen, appoint the commissioner of jurors. Subsequently, the consent of the board of aldermen was dispensed with, and the power to appoint the commissioner was vested in the mayor alone (Laws of 1884, chapter 43), and this power of appointment by the mayor was continued in section 118 of the Greater New York charter, under which Welde was appointed commissioner and claims the right to hold the books and papers pertaining to the office.

It is claimed on the part of the respondent that the revised charter of 1873, giving the appointment of the commissioner of jurors to the mayor, with the approval of the board of aldermen, constituted the office a city office, and that it has remained such ever since; that the act of 1901 did not change the character, scope or functions of the office, and that it did not abolish it, and that it is in conflict with the provisions of article 10, section 2, of the Constitution, which, it is claimed, has preserved to the city and other localities of the state local self-government, and the control of all the official functions of which they were possessed when the Constitution went into effect; that the only way this control can be taken away is by abolishing the office, etc.

The provision of the Constitution referred to by the respondent, which will be necessary to consider upon this review, is as follows: "All city, town and village officers, whose election or appointment is not provided for by this Constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the Legislature shall designate for that purpose. All other officers, whose election or appointment is not provided for by this Constitution, and all officers, whose

offices may hereafter be created by law, shall be elected by the people, *or appointed, as the Legislature may direct.*"

The office of the commissioner of jurors is not a constitutional office, and the Constitution contains no provision with reference to the election or appointment of this officer. The office, therefore, if made a city office must be filled by an election by the electors of the city or appointed by some authority thereof, unless it is an office created after the adoption of the Constitution, in which case it must be filled by election or by appointment in such manner "*as the legislature may direct.*" The legislature, however, may abolish a city office as unnecessary unless it is a constitutional office; and even if some of the functions of the office are necessary for the welfare of the municipality, these functions may be devolved upon other city officers. The object and purpose of the provision of the Constitution is to secure to the civil divisions of the state the right of local self-government, and the courts will not permit an evasion of this constitutional right by a change in the name of the office, or a division of the duties thereof under different names, or by the appointment of the officer in a different manner than that authorized by the Constitution. (*People ex rel. Bolton v. Albertson*, 55 N. Y. 50.)

Returning to a consideration of the provision of the act of 1901, we find that it is a general act applying to all of the counties in the state having a population of one million at the last federal census. It, therefore, applied to the county of New York. The power and duties of the commissioner when appointed are limited to the county. He is required to make up a list of persons to serve as jurors in the courts of the county, and these jurors are selected from the residents of the county. His salary and expenses are made a county charge instead of a city charge, and then, as we have seen, the act concludes by repealing all special and general laws inconsistent therewith.

Confessedly the prior existing acts, with reference to the commissioner of jurors in the city of New York are in conflict with the provisions of this act, and if it is not violative

of the provisions of the Constitution these acts by its provisions stand repealed, and the office of commissioner of jurors of the city of New York is abolished. But it is said that the functions of the office remain substantially the same. The answer to this contention is that prior to the adoption of this statute there was no such office for the county of New York. It is true that at one time there was such an office in the city of New York, and at that time the city covered the same territory as that of the county. But that time has passed. The city now embraces the whole of three counties and a portion of two others. Each of the other counties included in the city have the selection of their jurors provided for under other statutes and by other means. The mayor of the city is elected by the electors thereof. The people of the other counties and localities embraced within the city have a voice in his selection. They, therefore, through that officer whom they select, take part in the appointment of the commissioner of jurors for this county. In this way the electors of this county are compelled to submit to the choice made by others residing in other counties, and have their office of commissioner of jurors filled by others than themselves. This is not local self-government.

In the county of Kings there is another statute for the selection of jurors under which there is a commissioner of jurors, a deputy, clerks, a stenographer and messenger. The salaries and expenses are made a county charge. The people of that county are taxed and have to pay these expenses, and should they also be taxed to pay the expenses of the jury system in the county of New York for the reason that the commissioner of jurors in that county is a city officer? Is this just to the people of the county of Kings? In the counties of Richmond, Queens and Westchester other jury systems are in force for which the people of those counties have to pay. Should the people of these counties, who reside within the limits of the city, be also required to pay for the jury system in the county of New York? Is this just to these people, and has the legislature no power to provide a

remedy? Such in effect is the contention of the respondent. The functions of the office of a jury commissioner cannot well be dispensed with; and he contends that there can be no change made without abrogating the functions of the office.

The situation here presented has recently been condemned by this court in the case of *People v. Dooley* (171 N. Y. 74, 84). In that case the legislature had authorized the electors of the county of Kings to elect their own magistrates. Under the charter of the city of New York they were to be appointed by the mayor. In considering that situation WERNER, J., says: "Under the original plan each elector who exercised his right of franchise had an equal part in the selection of all the magistrates, through his vote for the mayor who appointed them. In the present situation the electors of the borough of Brooklyn have the right, in common with the electors of the borough of Manhattan, to vote for the mayor who appoints the magistrates in the first division; and also to vote, both by district and at large, for the magistrates in their own borough, although the right is denied to the electors of the first division." These views were indorsed by a majority of this court and every word applies forcibly to the situation we have presented in the case under consideration. The electors of the borough of Brooklyn had the right, in common with the electors of all the other boroughs included in the city, to vote for the mayor who appoints a jury commissioner in the borough of Manhattan. The electors of all the boroughs, other than Manhattan, also have the right to vote for the officers who select their jurors, thereby denying the right to the electors of Manhattan to choose their own officer for the performance of this function.

We think there is a remedy for these evils; that the legislature has the right to distribute the powers of local government, as between the city and county governments, as it may deem best; and that there is no provision of the Constitution which limits the power of the legislature in this regard. This, we think, was settled by the decision of this court in the case of *People ex rel. Taylor v. Dunlap* (66 N. Y. 162). In that

case the same statutes were under consideration, except the last one, which we have in this case. In that case a commissioner of jurors appointed under the provisions of the charter claimed the office from the commissioner appointed under the act of 1847. It was then contended that the office of commissioner, as created by the act of 1847, was a county office, and that the office could not be changed to a city office. In this case it is now contended that it is a city office and cannot be changed to a county office. ANDREWS, J., in delivering the opinion of the court, says "that the act of 1847 did not constitute the office a county office, but he also shows that it made no difference with the result if it were a county office, for he says, " Assuming that the commissioner of jurors, as constituted by the act of 1847, was a county officer, the legislature, by acting, lost none of its authority over the subject. It could thereafter abolish the office, or change its character from a county to a city office, and provide for a different mode of appointment. The whole subject was within the control of the legislature. What the legislature could have done originally, it could do by a subsequent enactment. * * * It is for the legislature to distribute the powers of local government, as between the city and the county governments, as it may deem best, and this discretion, when not restrained or excluded by some provision of the Constitution, is absolute, and no such provision, applicable to the matter under consideration, exists." If the legislature had the power to change the office from a county office to a city office, it would seem to also have the power to change it back again.

There is another consideration which may properly have influenced legislation upon this subject, and that is public policy. Complaints have not been uncommon to the effect that in some localities the jury lists have been made up almost exclusively of persons belonging to one of the great political parties. If there is any branch of the department of the government that ought to be strictly non-partisan, it is the jurors to whom is committed the determination of the rights of persons to life, liberty and property. Recognizing this,

the legislature in its wisdom has seen fit, by general laws, to provide for the appointment of commissioners of jurors in a number of the counties of the state in which there are large cities, and has given the appointment of such commissioners to the justices of the Appellate Division of the district in which the county is located, believing that the rights of persons would be safer and more scrupulously guarded by the justices of such courts who would see to it that impartial jurors were selected, than by any other board or officers to whom the appointment could be committed. The judiciary of the state forms one of the co-ordinate branches of the government. The statutes provide for the holding of the courts in the different counties of the state for the trial of civil and criminal cases that may arise in such localities. The jurors, when drawn, become a part of the court having governmental duties to discharge. It would seem, therefore, to be good public policy for the state in some measure to retain some control over positions of this character. If these considerations are good public policy in other parts of the state, we see no reason why they should not be in the county of New York.

The act of 1901 was passed after the adoption of the Constitution of 1894. It creates the office of commissioner of jurors in every county having the required population, which includes the county of New York. It is, therefore, a new office within the meaning of the provisions of the Constitution which we have under consideration, and, therefore, it may be filled by appointment in such manner "as the legislature may direct."

Again, in the case of *People ex rel. Taylor v. Dunlap*, it was distinctly held that the act of 1847 created a new office, and that under the Constitution it could be filled in such manner as the legislature should direct. It is contended, however, that although it was a new office at that time and so continued down until 1894, by the adoption of the new Constitution of that year it became an old office and could not thereafter be filled "as the legislature may direct." But the provisions of article 10, section 2, of the Constitution of 1894 are copied word for word from article 10, sec-

tion 2, of the Constitution of 1846. Section 32 of the Statutory Construction Law provides that "The provisions of a law repealing a prior law, which are substantial re-enactments of provisions of the prior law, shall be construed as a continuation of such provisions of such prior law, and not as *new enactments*." It is true this provision by its terms has reference to the construction of statutes. The Constitution is a higher law adopted by the people, and the legislature may have no power to repeal, amend or construe its provisions. The power to construe the Constitution devolves upon the courts, and the courts in construing its provisions are not controlled by any act of the legislature. But the provisions of this act are but declaratory of the rule previously laid down by the courts in numerous cases. (*Ely v. Holton*, 15 N. Y. 595; *Matter of Prime*, 136 N. Y. 347-353; *Lauds v. Chicago & N. W. R. Co.*, 33 Wis. 640; *Gilkey v. Cook*, 60 Wis. 133; *Blackwood v. Van Vleet*, 30 Mich. 118.)

The same rule applies to the construction of constitutions. Cooley in his work on Constitutional Limitations, at page 76 (6th ed.), says "Where a constitution is revised or amended, the new provisions come into operation at the same moment that those they take the place of cease to be of force; and if the new instrument re-enacts in the same words provisions which it supersedes, it is a reasonable presumption that the purpose was not to change the law in those particulars, *but to continue it in uninterrupted operation*. This is the rule in the case of statutes, and it sometimes becomes important, where rights had accrued before the revision or amendment took place. Its application to the case of an amended or revised constitution would seem to be unquestionable." If this were not so, many of the new offices created under the Constitution of 1846 in the different localities of the state would, upon the adoption of the Constitution of 1894, become inconsistent with its provisions herein referred to; for by its provisions it continued in force existing laws only, which were not inconsistent with its provisions. (See, also, Black on Interpretation of Laws, page 32, and authorities cited thereunder.)

It follows, therefore, that the Constitution of 1846 having been continued by the Constitution of 1894 in *hæc verba*, so far as these provisions are concerned, it is deemed to be a continuation of the provision from the time of its first enactment in 1846; and the offices that were new thereunder still continue to be new offices, which may be filled "as the legislature may direct." The creation of the office of the commissioner of jurors in the city of New York being a new office under the Constitution of 1846, still continues such and may be filled "as the legislature may direct."

In *Matter of Brenner* (170 N. Y. 185) a very different question was presented. That case was unique, and was so considered by the court at the time the decision was rendered. O'BRIEN, J., who delivered the opinion, says with reference to it: "It may be that the conditions in the county of Kings with respect to this office when the Constitution took effect were exceptional, in that the office had been made a county office by statute many years before, and hence the views here expressed apply only to such a case as is presented by this record."

It follows that the provisions of the act of 1901, so far as the county of New York is concerned, are not in conflict with the provisions of the Constitution.

The order of the Appellate Division and Special Term should be reversed and the motion granted, with costs in all the courts.

PARKER, Ch. J. (dissenting). The third Appellate Division unanimously affirmed an order of Special Term denying an application of Thomas Allison, as commissioner of jurors in the county of New York, for an order compelling the delivery to him of the books and papers appertaining to such office, and now in the possession of Charles Welde. The ground for the decision was that chapter 602 of the Laws of 1901, in so far as it attempts to confer upon the justices of the Appellate Division of the Supreme Court in the first department power to appoint a commissioner of jurors in and for

N. Y. Rep.] Dissenting opinion, per PARKER, Ch. J.

the county of New York, offends against § 2 of article 10 of the Constitution, and is, therefore, void.

This decision seems to be justified by the language of the Constitution, and it is certainly required by the decision of this court in *Matter of Brenner* (170 N. Y. 185), which affirmed the position unanimously taken by the same Appellate Division. The *Brenner* case considered the same statute, one of a series of enactments upon our statute books, made general in form in order to avoid offending against a very different constitutional provision than that now before us, but in substance and spirit special, and entitled "An act to provide for the appointment of a commissioner of jurors and to provide for a special jury in civil and criminal actions in each county of the state having a population of one million or more, according to the last preceding federal census." (Ch. 602, Laws of 1901.) In effect, therefore, the act provided for commissioners of jurors for the counties of New York and Kings. The justices of the Appellate Division of the first department appointed this relator for the county of New York, while those of the second Appellate Division appointed Jacob Brenner for the county of Kings.

The question relating to Brenner's appointment came first to this court, where it was decided that the office of commissioner of jurors in the county of Kings was, at the time the Constitution of 1894 went into effect, a county office, and that chapter 602 of the Laws of 1901 transferred the power of appointment from the local authorities to the justices of the Appellate Division of the Supreme Court in the second judicial department, which is a state authority, and so that act violated § 2, article 10 of the Constitution, which in terms restricts the power of the legislature to appoint to existing local offices, or to provide for appointment thereto by central or state authority.

The only differences between the *Brenner* case and this one are that in the *Brenner* case the appointment was made by the justices of the Appellate Division in the second department, while in this case it was made by the justices of that

court in the first department, and in the *Brenner* case the office of commissioner of jurors in the county of Kings at the time chapter 602 of the Laws of 1901 went into effect was a county office, while in New York it was a city office in name, the county and city territorially being the same. Therefore, chapter 602 attempted to continue in the county of Kings a county office as such, but in New York to continue an office by law termed a city office as a county office — certainly not a change of substance, but a change in name only.

The statement already made, that the decision in the *Brenner* case required the decision made by the Appellate Division in this one, needs no other support than the brief analysis I have made of the so-called distinguishing features.

I should omit further discussion, inasmuch as the *Brenner* case carefully considers every proposition involved, were it not that a suggestion has been made which perhaps should not be allowed to pass unnoticed.

It is said this court may hold that a new office has been created, and, therefore, the legislature has power to provide not only the method of appointment, but to provide that it may be made by other than local authority. Stated in other words, the position is that — while there was a commissioner of jurors exercising the functions of that office within the territory of New York, and the act under consideration provides for the exercise of similar functions within the same territory — nevertheless it may and should be called, by courts charged with the responsibility of preventing violations of the Constitution, a new office. If such a decision were possible it would open a very convenient avenue for defeating the will of the people as expressed in the constitutional provision under consideration; but this court closed the door against any scheme looking toward the undermining of this constitutional provision, and depriving it of the power of accomplishing the result intended, in *Devoy v. Mayor, etc., of New York* (36 N. Y. 449). To that and to the cases following it reference will be made.

In *Devoy's* case the question decided was whether the clause

N. Y. Rep.] Dissenting opinion, per PARKER, Ch. J.

in the act of the 15th of April, 1857, transferring to the metropolitan police board the power to appoint clerks to the police courts of New York, was unconstitutional and void, that power having been long prior to the act vested in the mayor and board of aldermen. The clause was held to be unconstitutional, this court saying: "Our views on this subject were expressed with great clearness by Judge DAVIES, who delivered the opinion of the court in the case of the *People v. Pinckney*. 'It is manifest that the officer to be appointed, to be within the power reserved to the legislature, must be an officer of the new district or division, and not merely local in the scope and performance of his duties and functions, and therein superseding some existing local officer. He must be a district officer, in the sense of his functions and authority, and not merely in name, with no powers and duties beyond a previously organized locality.' (32 N. Y. 382.) Our public statutes furnish conclusive evidence that the office of police clerk, in the city of New York, is not a new creation of the lawmaking power. It existed long before the Constitution, and there has been no substantial change, either in the official title or in the functions and duties of the incumbent."

In *People v. Raymond* (37 N. Y. 428) it was held not to be competent for the legislature to create a new office, and vest the power of appointment in the governor and senate when the duties were the same as those of a former county officer made elective by the Constitution. The decision is in point as to the question now being considered, and a portion of the argument contained in the opinion, written by Judge GROVER, in which all of his associates concurred, can with propriety be referred to in connection with the discussion of the suggestion that a new office has been created. Judge GROVER said: "The plain intention of the section of the Constitution in question was to preserve to localities the control of the official functions of which they were then possessed, and this control was carefully preserved, consistent with the power of the legislature to make needful changes, by restricting the power of appointment of other officers to perform the same func-

tions, to the people, or some authority of the locality. Any other construction would render the section in question, when applied to the cities of the state, substantially nugatory."

Here we have the key to the real meaning of this provision of the Constitution, which is, that the functions of local officers are to remain within the control of the local authorities. The Constitution did not aim at such a useless thing as preserving local control over an officer enjoying an ancient official title without its functions, while other officials appointed by other than local authority, under a new name, performed the duties which properly belonged to his office, and it has not been claimed that such was the intent of the constitutional provision since the case of *People v. Raymond* in any reported case in the state.

It was followed in *Metropolitan Board of Health v. Heister* (37 N. Y. 661), in which the court said, after quoting the constitutional provision: "This provision has been before this court on several previous occasions, and certain positions in relation to it may be conceded as settled. Its plain meaning, that all the local officers referred to, whose offices were in existence at the adoption of the Constitution, shall be elected or appointed by local authorities of which they are the representatives, has been fully sustained. So it has been held, that to change the name, or to divide up and partition the duties among several, or to take parts of the duties of several officers and combine them in one, will not be permitted. If the offices in question are county or city offices, and were in existence at the adoption of the Constitution of 1846, it is not competent to vest the appointment of incumbents in the governor and senate. It belongs exclusively to the local power to fill the offices, either by election or by appointment, as the legislature may direct."

In *People ex rel. Bolton v. Albertson* (55 N. Y. 50) the court took under consideration an act to create the Rensselaer police district, which provided for the establishment of a police force for the city of Troy and certain fragments of territory outside of the city limits. The act was held to violate the provision

of the Constitution involved in this case, the object of which is, the court said, to secure to the several recognized civil and political divisions of the state the right of local self-government, and this right cannot be taken from them, and the incumbents disfranchised, by any acts of the legislature or any or all departments of the state government combined. The spirit with which a court should approach the consideration of a challenge of a statute, as offending against the constitutional provision in question, is clearly presented in the court's holding, that a thing within the intent of a constitutional enactment is for all purposes to be regarded as within the words and terms of the Constitution, and a legislative enactment evading the terms and frustrating the general and clearly expressed or necessarily implied purposes of the Constitution is as clearly void as if in express terms forbidden. In the course of the opinion the court said: "The Constitution cannot be evaded by a change in the name of an office, nor can an office be divided and the duties assigned to two or more officers under different names, and the appointment to the offices made in any manner except as authorized by the Constitution; and courts will scrutinize acts of the legislature and see that the Constitution is not evaded and its intent frustrated by a mere colorable change in the designation and title or the duties of an officer, when the appointment is taken from the locality, and will hold the act void unless the change is real and substantial."

It follows from the authorities to which reference has been made that the test by which to determine whether the office be new or old is, Are the functions to be exercised by the new officers new or old? If old, then the Constitution insists that the old control shall continue.

The order should be affirmed, with costs.

BARTLETT and VANN, JJ. (and WERNER, J., except as to the last ground stated in the opinion, as to which he expresses no opinion), concur with HAIGHT, J.; O'BRIEN and CULLEN, JJ., concur with PARKER, Ch. J.

Order reversed, etc.

ELIZABETH H. SERVIS, Respondent, v. GEORGE SERVIS,
Appellant, Impleaded with Another.

HUSBAND AND WIFE — ACTION BY WIFE FOR ALIENATION OF HUSBAND'S AFFECTIONS — ERRONEOUS REFUSAL TO CHARGE. Where, upon the trial of an action brought by a wife against her husband's parents to recover damages for alienating his affections from her, the evidence is conflicting and would have warranted the jury in finding that, if he ever had any affection for her it had been alienated in some other way than by that pursued by the defendants, the refusal of the court to charge that if, at the time of the abandonment, the plaintiff's husband had no affection for her, or that it had been previously alienated by other causes she could not recover, is reversible error.

Servis v. Servis, 64 App. Div. 612, reversed.

(Argued October 22, 1902; decided November 18, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 31, 1901, affirming a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Theodore H. Lord and *Edward P. Coyne* for appellant. The plaintiff failed to sustain the burden of proof resting upon her to show that the defendant was the active procuring cause of her abandonment. (*Serles v. M. R. Co.*, 101 N. Y. 651; *Taylor v. City of Yonkers*, 105 N. Y. 202; *Bond v. Smith*, 113 N. Y. 378; *Laidlaw v. Sage*, 158 N. Y. 73; *Ruppert v. B. R. R. Co.*, 154 N. Y. 94; *Bennett v. Bennett*, 116 N. Y. 584; *Hutcheson v. Peck*, 5 Johns. 196; *Barnes v. Allen*, 1 Abb. Ct. App. Dec. 111; *Hermance v. James*, 32 How. Pr. 142; *Buchanan v. Foster*, 23 App. Div. 542.) The defendant in the exercise of his parental authority was authorized to advise and counsel his son, and in the absence of proof of coercion or malicious interference the plaintiff failed to establish her cause of action. (*Hutcheson v. Peck*, 5 Johns. 196; *Campbell v. Carter*, 6 Abb. Pr. [N.

N. Y. Rep.] Opinion of the Court, per PARKER, Ch. J.

S.] 151; *Hermance v. James*, 32 How. Pr. 142; *Pollock v. Pollock*, 9 Misc. Rep. 82; *Eldridge v. Eldridge*, 79 Hun, 511; *Buchanan v. Foster*, 23 App. Div. 542.) The trial court erred in denying defendant's motion to dismiss the complaint on the ground that it did not state a cause of action. (*Hutcheson v. Peck*, 5 Johns. 196; *Campbell v. Carter*, 6 Abb. Pr. [N. S.] 151; *Hermance v. James*, 32 How. Pr. 142; *Pollock v. Pollock*, 9 Misc. Rep. 82; *Eldridge v. Eldridge*, 79 Hun, 511; *Smith v. Lyke*, 13 Hun, 204; *Schuneman v. Palmer*, 4 Barb. 227; *Bennett v. Smith*, 21 Barb. 439.)

Edward J. Rosenau and *John F. McGee* for respondent. The plaintiff sustained the burden of proof resting on her and showed that the defendant was the active procuring cause of her abandonment. (*Moss v. Sherrill*, 63 Barb. 21; *Chaffee v. Moss*, 67 Barb. 252; *Brooks v. Moore*, 67 Barb. 323; *Cheney v. N. Y. C. & H. R. R. R. Co.*, 16 Hun, 415; *Reich v. Peck*, 83 Hun, 214.) The claim of the defendant that the court erred in not charging as requested is not well taken. (*Raymond v. Richmond*, 88 N. Y. 671.) The complaint did state a cause of action. (*St. John v. Northrope*, 23 Barb. 30; *Cady v. Allen*, 22 Barb. 388; *Wall v. B. W. Works*, 18 N. Y. 119; *Lounsbury v. Purdy*, 18 N. Y. 520; *Whittlesey v. Delaney*, 73 N. Y. 571; *Moffat v. Fulton*, 132 N. Y. 507.)

PARKER, Ch. J. A substantial judgment has been rendered in this case upon a verdict determining that defendants alienated from the plaintiff the affections of her husband, their son, Samuel H. Servis. The Appellate Division reversed as to the defendant Matilda Servis, granting a new trial on the ground that the verdict was contrary to the evidence, but affirmed by a divided court as to the other defendant.

Some time in the year 1895 plaintiff and Samuel were introduced at the house of a neighbor. He accompanied her home and obtained her consent to see her frequently. Afterward they met occasionally but under circumstances calculated

not to attract the attention of the neighbors, until June 18, 1897, when they were privately married in Buffalo. A considerable portion of the day had been devoted to horse races and drinking by the young man, who was taking a short vacation from school. They spent all of that night together. On all other occasions before and after the marriage when they met it was only for a brief period and at such places and under such circumstances as would be likely to prevent their meetings becoming known to relatives or acquaintances. This continued until nearly two years after the marriage when plaintiff began to insist that her husband should acknowledge their relations, and support her. Her threats and entreaties seem to have been alike unavailing, and so on March 23, 1899, she wrote to his father, as she had threatened, informing him of the marriage. The father testified he never received her letter. Samuel testified his father was ill at the time and that he (Samuel) went to the post office, got the registered letter, recognized plaintiff's handwriting in the address, opened the letter, read it, concluded that it was not prudent that his father should see it, and that his father did not see it or learn of its contents.

About the last of April Samuel went away and he wrote plaintiff informing her of the fact. He resided in Colorado until this action was tried, when he appeared as a witness for defendants, testifying emphatically that they had not in anywise contributed toward his decision to go away nor persuaded him to go. Appellant testified they had not attempted to alienate the affections of their son from his wife, saying he never had any conversation with his son in reference to his marriage.

The evidence relied upon to satisfy the court and jury — notwithstanding this positive evidence of both appellant and his son — that neither defendant had in anywise participated in any effort looking to an abandonment of plaintiff by the son, consists of alleged declarations made by defendants after April 26, 1899, when Samuel left the state with no apparent intention of returning.

N. Y. Rep.] Opinion of the Court, per PARKER, Ch. J.

Plaintiff testified that on May 1, 1899, she called on defendants and that her conversation with appellant was in part as follows: "Mr. Servis * * * said, 'I never approved of it, and you know it would be better for me that his son should leave me now than to leave me later.' * * * He said he did not want his son to live with me. He said he would give him anything to keep him from me. He said his son had gone west the Saturday night before, but he didn't say where. I said, 'Sam had no money to go away with.' He said, 'He sold the horses. * * * I gave them to him so that he would have money to go away with.' He said he gave him money. He could not allow him to go away without any. He said he didn't want me for a daughter-in-law. He said he didn't want me, and Sam should never live with me if he could do anything to keep him from me. He said he would give his son anything and everything he wanted. He would never have to work if he didn't live with me. He told me that in his own house, and said that he had said the same thing to my husband."

Now it is true appellant denies ever having had any such conversation with plaintiff, and asserts that he never threatened his son or urged him in any way to refuse to live with plaintiff. In that the son corroborates him. But the jury were at liberty to believe the testimony of plaintiff instead of that of appellant and his son, and the verdict shows they did so. From her testimony it must be said that there was some evidence tending to show that appellant used some influence against plaintiff after he knew of the marriage, and perhaps there may be found in the record some evidence tending to support an inference of fact that appellant contributed toward alienating from plaintiff her husband's affections.

Therefore, we should affirm the judgment did we not think that, under all the facts presented by this record, the court should have charged the jury, as the defendants' counsel requested, "that if the jury find from the evidence that, at the time of the abandonment, the plaintiff's husband had no affection for her, or that it had been previously alienated by

other causes, that then and in that case the plaintiff is not entitled to recover." That the request presented, under the circumstances in this case, a proposition which the defendants were entitled to have charged cannot be questioned.

There is in this record very little evidence of affection upon the part of either party. If it ever existed, both parties have been cautious in giving expression to it. This — considered with the fact of the secrecy always insisted upon by the husband and observed by the wife down to the time almost of the going away of Samuel, and the testimony of himself and his father, together with that of the attorney with whom Samuel consulted — strongly tended to show that plaintiff's husband did not hold her in affectionate regard, and would have warranted the jury in finding that if he ever had any affection for her it had been alienated in some other way than by threats made or inducements offered or deceit practiced by appellant.

The court in refusing to charge as requested gave no other reason than that conveyed in the following phrase: "I will not modify my charge on that subject." If the main charge sufficiently covered the subject the court was entirely justified in refusing any modification, but after a careful reading of it we are not able to reach the conclusion that the idea conveyed in that request was presented at all to the minds of the jury. The court did properly charge the jury that the burden was upon plaintiff to establish that her husband was alienated from, and induced to leave her by the active interference of the defendants, but the jury may very well have come to the conclusion, from the alleged declarations of appellant that he had given him money to go away with and horses to sell for that purpose, that the burden resting upon the plaintiff was met, whereas it may well have been, as testified to by appellant, that Samuel having made up his mind to go, his father simply furnished him the means.

Of the absolute right of a father to furnish money for the support of a son who has, for reasons good or bad, determined to abandon his wife, there is of course no doubt — a right that

N. Y. Rep.] Dissenting opinion, per BARTLETT, J.

he may exercise without being subjected to respond in damages to the deserted wife provided its exercise be not part of a general scheme having for its object the alienation of the husband's affection for his wife and her abandonment by him. Hence it was important in a case such as this that the jury should have their minds drawn sharply to the claim of appellant that if there ever was any affection existing between these parties it was alienated by other causes before he even knew of the marriage, and if found by them to be well grounded that there could be no recovery. We think the exception was well taken and calls for a reversal of the judgment.

The judgment should be reversed and new trial granted, with costs to abide event.

BARTLETT, J. (dissenting). The jury and the Appellate Division have decided in favor of the plaintiff and I vote to affirm the judgment awarding her damages.

The story of the plaintiff's married life is a pitiful one, and if this judgment is to be reversed on the ground that she did not sustain the burden of proof, it will introduce into the law of this state the startling doctrine that a father, who is of opinion that his son, twenty years of age, has married beneath him socially, may deliberately set at defiance the obligations of the marriage contract, intervene between man and wife and prevent the founding of a home where the contracting parties had planned to live together in that unity which public policy dictates.

The jury were permitted to find, on conflicting evidence, that the father of the husband was the active, procuring cause of the abandonment of this wife. From the moment the father heard of this marriage, until the separation was finally accomplished, he threatened that he would prevent its full consummation, if possible.

A wife has the right to the conjugal society of her husband, *consortium*, and if it be willfully violated by a third person, she may maintain an action in her own name. (Bul-

lock on Husband and Wife, 235; *Jaynes v. Jaynes*, 39 Hun, 40; *Baker v. Baker*, 16 Abb. N. C. 293, in which the opinion of MARTIN, J., is instructive.) This is, strictly speaking, a property right, the invasion of which she may resist. (*Bennett v. Bennett*, 116 N. Y. 584; cited with approval in *Kujek v. Goldman*, 150 N. Y. 176, 180.)

This plaintiff does not base her claim for recovery upon the fact that the husband's father expressed his disapproval of the marriage and permitted this son to live at home. The trial judge pointed out in his charge that it was only when a parent interfered between man and wife with an evil motive and to gratify his own taste that he was liable.

It is undoubtedly the law that the separation and abandonment brought about by the intervention of the parent must be wrongful.

The complaint in this action does not charge malice in express terms, but alleges a state of facts equivalent to it. Furthermore, whatever the defects in pleading, the evidence upon which the plaintiff rests her judgment came into the case without objection, so that defendant is deemed to have acquiesced in the issues as tried.

The plaintiff and defendant's son, Samuel, were married June 18th, 1897. The plaintiff testified that her husband wished the marriage kept secret for a time, as he stated the publication of it would make trouble for him at home. The wife acquiesced in this situation for nearly two years, she still filling the position of maid for the wife of Dr. Cary, and Samuel continued to live at home. The plaintiff told her mistress of the marriage and exhibited her marriage certificate. In March, 1899, the plaintiff, having in the interval vainly insisted on many occasions that the marriage should be made public, sent a registered letter to defendant, telling him of the marriage; this letter Samuel intercepted.

It appears from the testimony of Dr. Cary, in whose family the plaintiff resided, that shortly after the marriage, in October or November, 1897, he informed defendant of the fact, who said he did not believe it. The doctor told defend

N. Y. Rep.]

Dissenting opinion, per BARTLETT, J.

ant that he knew plaintiff had her marriage certificate and that they were married in Buffalo "back in June." Defendant said, "I won't have it and I will do everything I can to stop it." Samuel, the husband, testified that just before May, 1899, he saw that "it had gone to the limit of keeping things secret and putting it off." Samuel further testified as follows: "There was a time when I agreed to live with her and there was a date partly set at which we would commence keeping house. The date was May, 1899. She wanted me to live with her the first of May and I wanted to wait until the 15th and she would not wait." Samuel also testified that he left home for the west just before May 1st.

The plaintiff swears that she went down to Geneseo, where defendant lived, on May 1st, 1899, with the avowed purpose of seeing Samuel and making him redeem his promise to live with her. She swears she went to defendant's house and saw him. "I told him I was Sam's wife and wanted to see him. Then he came up and said, 'Sam had gone, went the Saturday night before.' That was all that was said that night." The next morning she met the defendant again and the conversation was resumed as to the marriage, as follows: "He (defendant) said *he would give him anything to keep him from me* and he gave him the horses to go away himself. He said he did not want his son to live with me. He said he would give him anything to keep him away from me. He said his son had gone west Saturday night before, but he did not say where. I said, 'Sam had no money to go with.' He said, 'he sold the horses.' I said, 'They were not his to sell.' He said, 'yes, I gave them to him so that he would have money to go away with.' He said he gave him money. He couldn't allow him to go away without any. He said he didn't want me for a daughter-in-law. He didn't want me and Sam should never live with me if *he could do anything to keep him from me*. He would give his son anything and everything he wanted. He would never have to work if he didn't live with me. He told me that in his own house *and said that he had said the same thing to my husband.*"

This was evidence the jury had the right to believe, and in view of the fact that Samuel was thus sent off west with the active assistance of the defendant the Saturday before he was to begin living with his wife and eighteen months later was brought back to trial, it was sufficient to satisfy the jury that the defendant, in the light of his own admissions, originated the scheme, carried it out in disregard of the marriage contract, because he did not desire his son to live with a wife of whom he disapproved, not because there was anything against her moral character, for the record establishes the contrary, but for the reason she was beneath him in social position.

The record clearly shows that if any one was likely to suffer by this marriage, it was the wife rather than the husband.

It is true that this wife, separated from her husband against her will, conspired against by his father and with no one to assist her, was compelled to make out the best case she could, and while it was of necessity drawn from the "camp of the enemy," it was sufficient to satisfy a jury who were confronted by the witnesses, and the Appellate Division whose peculiar jurisdiction it is to look into the facts.

The appellant raises a question of law on the refusal of the trial judge to charge "that if the jury find from the evidence that at the time of the abandonment the plaintiff's husband had no affection for her, or that it had been previously alienated by other causes, that then and in that case the plaintiff is not entitled to recover."

This request to charge contains two distinct propositions of law: (1) If plaintiff's husband had no affection for her at the time of the abandonment there could be no recovery; (2) if at the time of the abandonment the husband's affection had been alienated by other causes there could be no recovery.

If either proposition involves legal error, or was covered by the main charge, then the request was properly denied, as it should have been divided in order to secure a proper ruling. As to the first proposition, it is manifestly erroneous. A defendant who deprives a wife of the right to the conjugal

N. Y. Rep.]

Statement of case.

society of her husband, of *consortium*, of a home and all that it implies, may not measure the degree of affection that existed when the wrong was inflicted. The right to shelter, support and protection of a husband's name and presence is property. As to the second proposition, it is answered by the familiar rule that the trial judge is not required to charge an abstract proposition that is covered by the main charge. In this case the charge was full, fair and covered the precise point under consideration. The trial judge, speaking of plaintiff's burden of proof, said: "She is bound to satisfy you by a preponderance of all the evidence in the case that these defendants are responsible, that her husband was alienated and that he was induced to leave her and abandon her by their active interference, and that she in that respect has sustained a loss, and it is for that loss she asks a verdict at your hands. If she has satisfied you in that way, that they are liable and she has sustained any loss, then she is entitled to be compensated for the loss in money." This charge covers both alienation of affection and abandonment, and the request to charge the two abstract propositions was properly denied as covered by the main charge, and as multifarious.

The judgment should be affirmed.

GRAY, O'BRIEN, HAIGHT and VANN, JJ., concur with PARKER, Ch. J.; MARTIN, J., concurs with BARTLETT, J.

Judgment reversed, etc.

MICHAEL J. DADY, Respondent, v. JOHN H. O'ROURKE,
Appellant, Impleaded with Another.

172	447
173	480

EVIDENCE—WHEN PAROL PROOF INADMISSIBLE IN AN ACTION FOR RESCISSION TO EXPLAIN OR CONTRADICT WRITTEN CONTRACT. A written contract to sell all of one's stock in a corporation for a specified sum, containing an agreement that the stock holdings to be turned over amounted to three-fifths of the capital, is not fully performed by the vendor's delivery of a less number of shares, although they constituted his entire holdings, in such a manner as to entitle him upon the vendee's default in payment to maintain an action to rescind the contract, and parol evidence tending to show that the plaintiff intended to sell and the defendant to

buy only such stock as was held by the former, irrespective of the amount, is inadmissible, and will not justify a finding of complete performance.

Dady v. O'Rourke, 61 App. Div. 529, reversed.

(Argued October 21, 1902; decided November 18, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 3, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

L. Laflin Kellogg and *Alfred C. Petté* for appellant. The complaint should have been dismissed because, by the express terms of the contract, the plaintiff was to deposit three-fifths of the entire capital stock of the Gravesend Hygienic Ice Company, amounting to 720 shares, whereas, under the express allegations and admissions in the pleadings, it appears that he only deposited 687 shares, and was, therefore, himself in default. (*Holmes v. Hubbard*, 60 N. Y. 183; *Schoonmaker v. Hoyt*, 148 N. Y. 425; *C. S. R. R. Co. v. T. T. S. R. Co.*, 149 N. Y. 51; *Schroeder v. Frey*, 114 N. Y. 266; *Hoffman v. A. E. Ins. Co.*, 32 N. Y. 405; *White v. Hoyt*, 73 N. Y. 504; *Gillet v. Bank of America*, 160 N. Y. 549; *Oakley v. Morton*, 11 N. Y. 25; *Day v. Town of New Lots*, 107 N. Y. 148; *Romeyn v. Sickles*, 108 N. Y. 650; *La Chicotte v. R. R. & E. Co.*, 15 App. Div. 380.) The court erred to the prejudice of the defendant in admitting parol evidence against his objection as to the negotiations between the parties prior to the acceptance of the written agreement. (*Sherman v. D., L. & W. R. R. Co.*, 106 N. Y. 542; *Wilson v. N. E. R. R. Co.*, 56 App. Div. 570; *Marsh v. McNair*, 99 N. Y. 174; *Saunders v. Cooper*, 115 N. Y. 279; *Walton v. A. E. Ins. Co.*, 116 N. Y. 317; *United Press v. N. Y. P. Co.*, 164 N. Y. 406; *House v. Welch*, 144 N. Y. 418; *Corse v. Peck*, 102 N. Y. 513.)

Charles W. Church, Jr., for respondent. The contract did not require the plaintiff to sell three-fifths of all of the stock

N. Y. Rep.] Opinion of the Court, per PARKER, Ch. J.

of the company; on the contrary, the plaintiff claims that the contract is clearly ambiguous, and that, therefore, it was proper to show the surroundings of the same to show what was intended. (*United Press v. N. Y. P. Co.*, 164 N. Y. 406; *Corse v. Peck*, 102 N. Y. 513.)

PARKER, Ch. J. Plaintiff and defendant on October 30, 1899, entered into the following contract :

"In consideration of the sum of one dollar (\$1) to me in hand paid, the receipt whereof is hereby acknowledged, I hereby give unto John H. O'Rourke, of the Borough of Brooklyn, City of New York, an option to purchase all my right, title and interest in the property and assets of the Gravesend Hygienic Ice Company, including the stock now held and owned by me, either in my name or in the name of any person or persons for my benefit, said stockholdings amounting to three-fifths of the entire capital stock of said company, for the sum of \$30,000, to be paid on or before the 1st day of December, 1899, on which day this option shall expire in default of payment being made. Upon the payment of said \$30,000, on or before the 1st day of December, I agree to make assignment in blank of my stock in said Gravesend Hygienic Ice Company, and also to procure the resignation of the present officers and directors of said company, and to deposit said stock and resignation with the Hamilton Trust Company of Brooklyn, New York City, in escrow, the same to be retained by them and delivered to said O'Rourke upon the payment by him of \$30,000. I hereby further agree that at the present time there are no claims or debts or liens of any description against the property or effects of the Gravesend Hygienic Ice Company except two mortgages of \$30,000 each. And I hereby further agree that, upon the consummation of the sale hereby contemplated, that there shall be no liens upon the property of said company except the two mortgages above referred to, and that the company shall be free from debts of all description except said two mortgages. I further agree that I will sell all my

right, title and interest to the dock property at the foot of 21st Street for the sum of \$1,500."

Plaintiff, as we must assume from this record, performed all the promises on his part except, as appears by the pleadings, that he deposited with the Hamilton Trust Co. only 687 shares instead of three-fifths — 720 shares — of the capital stock. Defendant deposited with said trust company \$30,000, but he notified it not to pay the money to plaintiff until he had deposited 720 shares. Thereupon plaintiff brought this action to rescind the contract, claiming in his complaint that he had made full performance of the contract, and defendant had broken the contract on his part by notifying the trust company not to pay the moneys deposited to plaintiff. The trial court found as a fact that plaintiff has performed his part of the agreement according to its spirit and intent, and that as defendant refuses to perform his part plaintiff had the right to judgment of rescission.

These findings having been unanimously affirmed by the Appellate Division, we are now to inquire whether any errors were committed to the prejudice of defendant in admitting parol evidence against his objection as to the negotiations between the parties prior to the acceptance of the written agreement. The evidence objected to was as follows :

"Q. At the time you had this conversation about selling your stock to Mr. O'Rourke, at the time of making the contract, what was said? Objected to on the ground that oral communications are merged in the contract. The Court: What is the purpose of it? Mr. Church: To show here is a clause which is contradictory. The Court: To make patent what is latent; that it meant what he had rather than exact proportion? Mr. Church: Yes, sir. The Court: I will take the proof so far as it has to do with that part of the contract. Defendant excepts. Q. At the time these negotiations were had with Mr. O'Rourke leading up to the signing of this contract what was said about the amount of stock you had, as between you and Mr. O'Rourke? What was said about your sale between you and Mr. O'Rourke? Objected

N. Y. Rep.] Opinion of the Court, per PARKER, Ch. J.

to; objection overruled; defendant excepts. A. Mr. O'Rourke asked me would I sell my interest for one hundred thousand dollars with his interest; that he had made an arrangement in New York that we should sell the company for one hundred thousand dollars, of which I was to get sixty thousand, or three-fifths, and he the other two-fifths. Q. What was said about the amount of stock you had? A. Mr. O'Rourke came to me with a paper, and asked me to sign a paper, fifty dollars paid in hand to the party of the second part; I said, What is the fifty dollars for? He said, That is the amount they gave me; I said, I never saw a part like that in it; he said, We will get forty thousand dollars cash, of which you are to get three-fifths, which is twenty-four thousand dollars, and I get two-fifths, which is sixteen thousand dollars, and we each keep our mortgages; I said no. Q. What was said by you to O'Rourke about what you would sell him when you signed this contract? A. I sold my interest in the company. Q. Was it what O'Rourke said to you, that he got all the balance which you did not get? Objected to as leading. Q. What did he say about that? A. There was not any contest about the stock. Q. But what did he say? A. He did not say anything, only he said, I will get the endorsement on the back of these two certificates, Mr. Cox and Mr. Kearney's, I will get them; there was not any contest about the stock at all."

Without this testimony, and other evidence in the record tending in the same direction, the trial court could not well have found complete performance on the part of plaintiff, for the contract provides for a sale by the plaintiff of "all my right, title and interest in the property and assets of the Gravesend Hygienic Ice Company, including the stock now held and owned by me, either in my name or in the name of any person or persons for my benefit, said stock holdings amounting to three-fifths of the entire capital stock of said company."

It is urged on the part of plaintiff that his part of the contract would have been performed by delivering to the trust company all his stock, whether the number of shares was 687 or a much less number, so that if the amount actually

owned and held by him had been one-fifth instead of three-fifths, the turning over of that amount to the trust company would have constituted performance on his part. But we do not so understand the contract. As we read it, he not only agreed to turn over all his stock, but also agreed that the stock holdings thus to be turned over amounted to three-fifths of the entire capital.

One of the rules to be applied in the construction of contracts is that they shall be construed so that all parts may stand together if they are capable of such an interpretation. A covenant in large and general terms may be restrained and narrowed where the intent to restrain and narrow or qualify is apparent from other parts of the same instrument. Thus in *Holmes v. Hubbard* (60 N. Y. 183), upon the dissolution of a partnership between D. & H., H. purchased D.'s interest and gave him a bond signed by himself and another conditioned to indemnify D. "from all and singular the debts and liabilities" of the firm. At the end of the formal part of the bond were added the words "Liabilities as per schedule of indebtedness hereto attached." This court held that the general terms of the condition were limited and qualified by the added clause; and that the obligors were not liable for a copartnership debt not mentioned in the schedule. That case is in point here and should be controlling.

Still another rule of construction is that the intention of the parties is to be sought in the words and language employed, which are to be read and understood according to their natural and obvious import. (*Schoonmaker v. Hoyt*, 148 N. Y. 425.)

Applying these rules to the contract before us the conclusion must be reached, we think, that plaintiff agreed to sell his holdings in the ice company, and agreed that they amounted to three-fifths of the entire capital.

Now, it must be borne in mind that this is not an action to reform a contract so that it shall voice the agreement the parties intended to make. On the contrary, it is based on the contract *as it was written* with the claim of full performance

N. Y. Rep.] Opinion of the Court, per PARKER, Ch. J.

on the part of plaintiff, and, therefore, cannot be maintained by evidence that the contract was intended to be a different one, for it is the general rule that when an agreement is reduced to writing, it, as between the parties, merges and overcomes all prior or contemporaneous negotiations upon the subject, and that oral evidence is not admissible to vary, explain or contradict its terms, for the writing is conclusively presumed to contain the whole engagement of the parties. (*Stowell v. Greenwich Ins. Co.*, 163 N. Y. 298.) There are certain exceptions to the rule referred to in that case, but as this case is not within any of them they need not be referred to. Other authorities to the same effect are *Marsh v. McNair* (99 N. Y. 174); *Sanders v. Cooper* (115 N. Y. 279); *Walton v. Agricultural Ins. Co.* (116 N. Y. 317); *United Press v. N. Y. Press Co.* (164 N. Y. 406).

The evidence was apparently admitted upon the view that the contract was ambiguous and hence that the proof of the facts and surrounding circumstances was admissible in order to aid the court in arriving at the intention of the parties, but as we read it it is clear and unambiguous, and, therefore, to be construed according to its language.

Now, the evidence admitted against the objection of the defendant, some of which we have quoted, was prejudicial to defendant, tending to show that it was the intent of the parties that plaintiff should sell only his interest in the stock of the company, whatever it might be, and as the court found that plaintiff had fully performed his part of the agreement it must, in view of our construction of the contract, have been based upon the evidence adduced outside of the contract tending to show that plaintiff only intended to sell and defendant to buy such of the stock of the company as was held and owned by plaintiff.

It follows that the judgment should be reversed, and a new trial granted, with costs to abide the event.

GRAY, O'BRIEN, BARTLETT, HAIGHT and VANN, JJ., concur; MARTIN, J., not voting.

Judgment reversed, etc.

In the Matter of the Accounting of WILLIAM B. DAVENPORT, Public Administrator of the County of Kings, as Administrator of the Estate of SARAH L. CULLEN, Deceased.

THOMAS H. TROY, as Special Guardian of Infant Next of Kin, Appellant; CHLOE CARROLL RHEM et al., Respondents.

SURROGATE'S COURT — DISTRIBUTION OF PERSONAL PROPERTY OF INTESTATE LEAVING NEPHEW AND NIECE AND UNCLES AND AUNTS AND DESCENDANTS OF DECEASED UNCLES AND AUNTS — CODE CIVIL PROCEDURE, § 2732, SUBDIVISION 12, AS AMENDED BY CHAPTER 319 OF LAWS OF 1898 — EFFECT OF, WHEN CONSTRUED WITH SUBDIVISIONS 5 AND 10 OF SUCH SECTION. Subdivision 12 of section 2732 of the Code of Civil Procedure, as amended by chapter 319 of the Laws of 1898, providing that in the distribution of personal property of decedents, "Representation shall be admitted among collaterals in the same manner as allowed by law in reference to real estate," must be construed with subdivision 5 of such section, providing that "If there be no widow, and no children, and no representatives of a child, the whole surplus shall be distributed to the next of kin, in equal degree to the deceased, and their legal representatives," and with subdivision 10 of such section, which provides that "When the descendants, or next of kin of the deceased, entitled to share in his estate, are all in equal degree to the deceased, their shares shall be equal:" and where an intestate, leaving personal property only, is survived by a nephew and niece, the children of a deceased brother, two uncles, two aunts and many descendants of deceased uncles and aunts, the nephew and niece, the two uncles and the two aunts are all of the same degree of kinship, to wit, the third, and it is unnecessary to invoke the rule of representation, and the estate should be distributed equally among them.

Matter of Davenport, 67 App. Div. 191, affirmed.

(Submitted October 6, 1902; decided November 18, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered December 23, 1901, which modified and affirmed as modified a decree of the Kings County Surrogate's Court settling the accounts of William B. Davenport, as administrator of the estate of Sarah L. Cullen, deceased.

The facts, so far as material, are stated in the opinion.

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

Thomas H. Troy, special guardian, appellant in person. By the Civil Code, prior to 1898, in this case uncles, aunts, nephews and nieces would have divided the estate. (*Durant v. Prestwood*, 1 Atk. 454; *Hurtin v. Proal*, 3 Bradf. 414.) The amendment of 1898 worked no change in the scheme of distribution to those who took in their own right. (Code Civ. Pro. § 2732.) Representation in successions is a rule of law by which the descendants of a predeceased heir or distributee take their ancestor's lapsed share in an estate collectively among them. (*Dexter v. Dexter*, 4 Mason C. C. 302; *Daboll v. Field*, 9 R. I. 266; *Adams v. Smith*, 20 Abb. [N. C.] 61; *Kelly v. Kelly*, 5 Lans. 443; *Pond v. Bergh*, 10 Paige Ch. 140; *Hyatt v. Pugsley*, 23 Barb. 301.) The rule of representation gathered from the combined statutes of distribution and descent entitles the cousins to their dead ancestor's share. (Dwarris on Stat. 695; Code Civ. Pro. § 2732.)

William T. Carlisle for respondents. The amendment to the Code of Civil Procedure admits representation among collaterals in the same manner as allowed by law in reference to real estate. (Code Civ. Pro. § 2732, subd. 12.) The common ancestor of the intestate and of her deceased brother's children is the intestate's father; but the common ancestor of the decedent and of her uncles and aunts is the grandfather of the decedent. Consequently the respondents herein inherit this estate between them. They collectively inherit the share which their parent, the brother of the deceased, would have received if living. (L. 1896, ch. 547, § 287.) Uncles and aunts and nephews and nieces are in equal degree, but the nephew and niece only are heirs at law in the case at bar; therefore, the whole surplus in the hands of the administrator herein should be distributed to these respondents in equal shares. (Code Civ. Pro. § 2732, subd. 12.)

BARTLETT, J. This appeal involves the construction of the statute regulating the distribution of personal property. (§ 2732, Code of Civil Procedure, as amended by chapter

319, Laws of 1898.) This amendment took effect September 1st, 1898.

The intestate died on the 15th day of September, 1898, possessed of personal property only. She left no husband, ancestor, descendant, brother or sister, but was survived by a nephew and niece, Charles Christopher Carroll and Chloe Carroll Rehm, children of a deceased brother, two uncles, two aunts, forty-five first cousins, thirty-three second cousins and one third cousin, making in all eighty-one next of kin, the first, second and third cousins being descendants and representatives of deceased uncles and aunts.

This appeal is taken by the special guardian of three second cousins and one third cousin, being infants over the age of fourteen years.

The decree of the Surrogate's Court divided this estate into eighty-one shares and distributed the same to all of said collaterals. The nephew and niece appealed from this decree, insisting that they were entitled to one-half each of the net amount of the personal property to be distributed.

The Appellate Division modified the decree of the surrogate, holding that the nephew and niece and the two uncles and two aunts were next of kin in equal degree, being the third degree, and that the estate should be divided into six equal parts and so distributed. The other collaterals named were excluded.

The special guardian and appellant now claims that the order of the Appellate Division should be reversed and the decree of the surrogate affirmed, while the only respondents on this appeal, the nephew and niece, insist that they alone are entitled to the personal estate of the intestate. The nephew and niece have not appealed from the order of the Appellate Division.

Prior to the amendment of 1898 subdivision 12 of this section read as follows: "No representation shall be admitted among collaterals, after brothers' and sisters' children."

By chapter 319 of the Laws of 1898 this subdivision was amended so as to read as follows: "Representation shall be

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

admitted among collaterals in the same manner as allowed by law in reference to real estate."

The theory upon which the decree of the Surrogate's Court rests is, that the nephew and niece, uncles and aunts are all next of kin in equal degree, and that the descendants of deceased uncles and aunts, of whom there are a large number, take by representation.

It is not reasonable to assume that the legislature in amending a statute, coming down, in substance, from Justinian, providing that "no representation shall be admitted among collaterals after brothers' and sisters' children," would open wide the gates to all collaterals, thus dividing up estates, in many instances, into sums so small as to benefit no one.

In repealing this ancient statute the legislature provided a new rule, to the effect that "representation shall be admitted among collaterals in the same manner as allowed by law in reference to real estate."

The descent of real property is regulated by chapter 547 of the Laws of 1896, article IX, known as the Real Property Law (Vol. 1, p. 620).

Section 287 reads as follows: "If all the brothers and sisters of the intestate be living, the inheritance shall descend to them; if any of them be living and any be dead, to the brothers and sisters living, and the descendants, in whatever degree, of those dead; so that each living brother or sister shall inherit such share as would have descended to him or her if all the brothers and sisters of the intestate who shall have died, leaving issue, had been living, and so that such descendants in whatever degree shall collectively inherit the share which their parent would have received if living; and the same rule shall prevail as to all direct lineal descendants of every brother and sister of the intestate whenever such descendants are of unequal degrees."

Section 288 provides for the manner in which uncles and aunts of the intestate and their descendants shall take "if there be no heir entitled to take, *under the preceding sections*."

It follows that if the Surrogate's Court was right in hold-

ing that the law of representation was to control among collaterals, the nephew and niece would be entitled under section 287 of the Real Property Law to the entire estate.

It is clear, from the reading of section 288, that uncles and aunts and their descendants inherit only when there are no brothers and sisters or their descendants.

It, therefore, becomes necessary to construe section 2732 of the Code in the light of all its provisions and of the new rule as to representation established by the amendment of subdivision 12 of this section in 1898.

Subdivision 5 reads: "If there be no widow, and no children, and no representatives of a child, the whole surplus shall be distributed to the next of kin, in equal degree to the deceased, and their legal representatives."

Subdivision 10 reads: "Where the descendants, or next of kin of the deceased, entitled to share in his estate, are all in equal degree to the deceased, their share shall be equal."

The important question in this case is, reading all the provisions of section 2732 together, when is the rule of representation to be invoked in the distribution of personal property?

In subdivision 5, as quoted, we have the clear rule laid down that the next of kin, in equal degree to the deceased and their legal representatives, are to take, and subdivision 10 declares that where the next of kin entitled to share are in equal degree their shares shall be equal.

The surviving nephew and niece, the two uncles and the two aunts are all of the same degree of kinship, to wit, the third, and under these circumstances it is unnecessary to invoke the rule of representation.

To give any other construction to the present law of distribution would be, in the great majority of cases, to divide estates into shares so small as to benefit none of the next of kin.

We cannot conceive that it was the intention of the legislature to establish any such rule of distribution as indicated by the decree of the Surrogate's Court.

If the construction we have indicated is the true reading of this section, it follows that the order of the Appellate Division must be sustained.

The result of our construction would be that if in this case the nephew and niece had not survived, but the two uncles and two aunts were living at the time of testatrix's death, these four of equal degree would have taken the estate. If, however, the testatrix left no nephew, niece, uncle or aunt her surviving, but there were descendants of nephews and nieces, uncles and aunts, then the rule of representation would apply "in the same manner as allowed by law in reference to real estate."

As already pointed out, under the Real Property Law, brothers and sisters and their descendants inherit in the first instance, and if there be none then the aunts and uncles of the intestate and their descendants take.

The order of the Appellate Division should be affirmed, with costs to both parties payable out of the estate.

CULLEN, J. (dissenting). I cannot agree with Judge BARTLETT as to the effect of the amendment of 1898. Section 2732 of the Code provides how distribution shall be made in intestacy. This case falls within subdivision 5: "If there be no widow, and no children, and no representatives of a child, the whole surplus shall be distributed to the next of kin, in equal degree to the deceased, *and their legal representatives.*" The uncles or aunts and the nephews or nieces of a deceased are equally near of kin to him (McClellan Surrogate's Practice, 642), all in the third degree. (*Hurtin v. Proal*, 3 Brad. Surrogates, 414; 2 Kent Com. 424.) Subdivision 11 of the section provides that when such descendants or next of kin are of unequal degree of kindred the surplus shall be divided between them according to their respective stocks, so that those who take by representation shall receive the share to which the parent whom they represent, if living, would have been entitled. If these provisions had stood alone, personal property would have been distributed by representation as

is the case with real estate. But subdivision 12 provided that "no representation shall be admitted among collaterals, after brothers' and sisters' children." It was questioned whether this inhibition prevented representation of those who are not brothers' and sisters' children, such as the descendants of uncles and aunts or of cousins. But this court held in *Adee v. Campbell* (79 N. Y. 52) that the limit of representation prescribed by the subdivision applied to all collaterals and that hence first cousins took to the exclusion of second cousins. By the amendment of 1898 the provisions of subdivision 12 were repealed, and in lieu thereof it was enacted: "Representation shall be admitted among collaterals in the same manner as allowed by law in reference to real estate." This provision is general and applies to all collaterals. If, as was held in the case cited, subdivision 12, as it formerly stood, applied to representation among all collaterals, is it not clear that the repeal of that provision and the direct enactment that representation shall be admitted among collaterals to the same extent as in the descent of real estate authorize representation among all collaterals? It is suggested that "it is not reasonable to assume that the legislature in amending a statute, coming down, in substance, from Justinian, providing that 'no representation shall be admitted among collaterals after brothers' and sisters' children,' would open wide the gates to all collaterals, thus dividing up estates in many instances into sums so small as to benefit no one." 'It seems to me that this is just what the legislature has done and that it could have used no more efficacious language for that purpose. The fact that in this case the property will be divided into small sums cannot affect the general rule. If the estate were large, even small fractions would represent substantial amounts. Moreover, representation among descendants of brothers and sisters is quite likely in many cases to cause minute subdivision of the estate. That in this case the descendants of the uncles and aunts are numerous, while there are no descendants of deceased nephews and nieces is merely the accident of the particular case.

N. Y. Rep.]

Dissenting opinion, per CULLEN, J.

I do not see that the law which obtains in the descent of real estate, that the descendants of brothers and sisters inherit to the exclusion of uncles and aunts, has any application to the question under discussion. It may be argued that by the enactment of the new provision in subdivision 12, the legislature intended to provide that the distribution of personalty should be made in accordance with the descent of realty. But this argument proves too much, for if it is sound it would prevent the uncles and aunts from sharing in the estate. There can be no consistent or logical construction of the statute as it now stands which will admit uncles and aunts and exclude their descendants. There is this further suggestion to be made. If we affirm the doctrine of the Appellate Division, what is the law when an intestate leaves uncles and aunts and descendants of deceased uncles and aunts but no brothers or sisters or descendants of brothers and sisters? Will representation then be allowed in the shares of deceased uncles and aunts? If it is denied, it will be in express contradiction of the direction of the statute, that representation shall be allowed among collaterals in the same manner as admitted in reference to real estate. But on what principle can it be admitted consistently with the decision below? The contention that since the change in the statute, distribution is to be made in conformity with the descent of real estate, is not seriously pressed. If it were, a perfect answer to it is that subdivision 5 of section 2732 remains in full force, and directs that the distribution shall be, not in accordance with the descent of real estate, but "to the next of kin in equal degree to the deceased and their legal representatives."

I think the judgment must be reversed and the representatives of deceased uncles and aunts allowed to share. This seems to me the only logical construction of the statute.

PARKER, Ch. J., O'BRIEN, HAIGHT, VANN and WERNER, JJ., concur with BARTLETT, J.; CULLEN, J., reads dissenting opinion.

Order affirmed.

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In the Matter of the Application of the GREENWICH AND JOHNSONVILLE RAILWAY COMPANY, Appellant, v. THE GREENWICH AND SCHUYLERVILLE ELECTRIC RAILROAD et al., Defendants.

THE HUDSON VALLEY RAILWAY COMPANY, Respondent.

RAILROADS—WHEN RIGHT TO SELECT NEW TERMINUS AND EXTEND EXISTING RAILROAD INTO AN ADJOINING COUNTY IS LIMITED. Section 13 of the Railroad Law (L. 1890, ch. 565), providing that "Every railroad corporation, except elevated railway corporations, may, by a vote of two-thirds of all its directors, alter or change the route or any part of the route of its road or its termini, or locate such route, or any part thereof, or its termini, in a county adjoining any county named in its certificate of incorporation, if it shall appear to them that the line can be improved thereby, upon making and filing in the clerk's office of the proper county a survey, map and certificate of such alteration or change," etc., does not permit a railroad corporation to select a new terminus for its railroad in an adjoining county seven miles beyond its original terminus and extend its railroad thereto where the change or improvement contemplated is not one for the purpose of benefiting the line located by the articles of association, has no reference to some feature of the line itself, such as an easier grade or a lessened cost of construction and maintenance, but is a mere reaching out into another county for the purpose of increasing the business of the road.

Matter of G. & J. Ry. Co. v. G. & S. El. R. R., 75 App. Div. 220, affirmed.

(Argued October 20, 1902; decided November 18, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered September 17, 1902, which affirmed an order of Special Term dismissing a petition in condemnation proceedings entered upon the report of a referee.

In this proceeding the plaintiff seeks to condemn certain lands for its use. It appears from its petition that it is engaged in the operation of a steam railroad between Johnsonville, Rensselaer county, and Greenwich, Washington county, N. Y., and that it is the successor, through foreclosure and reorganization proceedings in 1879, of the Union Village

and Johnsonville railroad, a corporation organized in 1866. It alleges that "in pursuance of the Railroad Law, paragraph 13, your petitioner, by a vote of two-thirds of all of its directors, has altered and changed its route and terminus, by extending its route from its present terminus in the village of Greenwich, Washington county, New York, through the towns of Greenwich and Easton in Washington county, N. Y., to Schuylerville, in Saratoga county, N. Y., which is a county adjoining Washington county, and the certificate of such alteration and change, as required by statute, has been duly made and entered," in the appropriate county clerks' offices. The making and filing of survey and map, showing the alteration and change as proposed, are alleged and it is stated "that the plaintiff's line will be improved by such change of route and terminus, and a number of mills and a large quantity of freight will be reached by this extension." Allegations follow, to the effect that the lands described in the petition are in the "line of the survey of such extension and are necessary to the plaintiff to make such extension," for the location of its tracks, the operation of its steam railroad from Greenwich to Schuylerville and "to serve the public as a common carrier." There are other allegations, relating to matters proper to be stated and describing the acts done by the plaintiff to entitle it to begin the proceeding. The Greenwich and Schuylerville Electric railroad is defendant and claims to be the owner of the lands which are sought to be condemned. It was organized under the laws of this state, for the purpose of constructing a street surface railroad from the village of Greenwich, Washington county, N. Y., to the village of Schuylerville, Saratoga county, N. Y. The answer to the petition in its behalf is made by the Hudson Valley Railway Company, its successor through consolidations. The answer alleges that the petition does not state facts sufficient to authorize the plaintiff to maintain the proceeding to acquire title to the lands described and contains a denial of all its material allegations. It alleges that the lands owned by it in the town of Greenwich are held in trust for the public

use and are actually used by it for depots and gravel beds, and that the consents of the trustees of the village of Greenwich, of the town board of the town of Greenwich and of a majority of the taxpayers in said village and town had not been procured.

The issues were referred to a referee to hear and determine, who reported, with findings of facts, that the plaintiff was not entitled to institute the proceeding and he directed judgment dismissing the same. Upon appeal to the Appellate Division, in the third judicial department, the judgment appealed from was affirmed by an order, which stated as follows: "a majority of the court determining that the conclusions of fact are unsupported by the evidence and should be reversed and that, as matter of law, the petitioner is not entitled to the relief asked for, now * * * Ordered, that the judgment, etc., is affirmed." The plaintiff now appeals from the order of the Appellate Division to this court.

C. C. Van Kirk for appellant. Section 13 of the Railroad Law authorized the plaintiff, a steam railroad company, whose line was already completed from Johnsonville to Greenwich, upon complying with that paragraph, to alter its route, change its terminus and locate its line, from Greenwich in Washington county to Schnylerville in Saratoga county, which adjoins Washington county. (*Matter of R. R. Co.*, 88 N. Y. 284; *Matter of R. R. Co.*, 77 N. Y. 248; *E. Ry. Co. v. Steward*, 170 N. Y. 172; *People v. R. R. Co.*, 12 Wkly. Dig. 375; 89 N. Y. 75; *Matter of R. R. Co.*, 36 App. Div. 514.) The Appellate Division improperly refused to order a new trial. Such refusal was error and is reviewable in this court. (*Griffin v. Marquardt*, 17 N. Y. 28.)

Thomas O'Connor for respondent. The filing of the certificate of extension by the plaintiff on June 23, 1899, exhausted plaintiff's right of extension, and no further extension could be made, nor any other line located. (*Matter of P. B. Co.*, 108 N. Y. 483; *H. & D. C. Co. v. N. Y. & E.*

N Y. Rep.] Opinion of the Court, per GRAY, J.

R. R. Co., 9 Paige Ch. 323; *B. C. R. R. Co. v. B. C. R. R. Co.*, 32 Barb. 358; *Mason v. B. C. & N. R. R. Co.*, 35 Barb. 373; *People v. N. Y. & H. R. R. Co.*, 45 Barb. 73; *Negus v. City of Brooklyn*, 10 Abb. [N. C.] 180; *N. Y. & A. R. R. Co. v. N. Y., W. S. & B. R. R. Co.*, 11 Abb. [N. C.] 386; *Brigham v. A. R. R. Co.*, 83 Mass. 316; *E. R. R. Co. v. Steward*, 170 N. Y. 179.) The Appellate Division was correct in its conclusion that the plaintiff company could not legally extend its road from Greenwich to Schuylerville. (L. 1890, ch. 565, § 13.)

GRAY, J. As this case comes before us, it is manifest that, with the reversal of the judgment, so far as it rested upon the facts, the question of law remains whether, upon the allegations of the petition, power has been conferred by the statute to accomplish the purpose sought and stated therein. It appears in the petition, and it is the plain and undisputed fact, that what is proposed by the petitioner, as an alteration, or change, of its route and of its present terminus in the village of Greenwich, is to extend that route from that terminus and village to the village of Schuylerville, in the adjoining county of Saratoga, a distance of some seven miles. Authority to do this is claimed to be found in section 13 of the Railroad Law (L. 1890, ch. 565, as amended). That section, which is entitled "Change of route, grade or terminus," provides as follows: "Every railroad corporation, except elevated railway corporations, may, by a vote of two-thirds of all its directors, alter or change the route or any part of the route of its road or its termini, or locate such route, or any part thereof, or its termini, in a county adjoining any county named in its certificate of incorporation, if it shall appear to them that the line can be improved thereby, upon making and filing in the clerk's office of the proper county a survey, map and certificate of such alteration or change," etc. The language of the section, upon its face, seems to carry a rather broad grant of power and appears to afford some support to the argument of the plaintiff. It is argued that, where the corporate purpose is to change the terminus,

there must be an extension of route ; for the only possible way to do so is by going beyond the existing terminus and locating the line ; as otherwise, it would be contravening a clause of section 13, which provides that "no portion of the track of any railroad * * * shall be abandoned under this section." The trouble, or difficulty, with the language of this section is in its indefiniteness, in the respect claimed. Conceding, as I think we should, the propriety of giving to the statute as liberal a construction as the broadness of its apparent grant of power warrants, it, nevertheless, must be borne in mind that, in a case where it is sought, under cover of its authority, to take private property *in invitum* the owner, that authority must be seen to apply exactly to the case stated. In this case, we have a railroad corporation whose route, or line of road, was located between termini fixed by the charter at the village of Johnsonville, in Rensselaer county, and the village of Greenwich, in Washington county. It has been engaged in the operation of its railroad upon that route since 1879. Its avowed purpose, as stated in its petition, is to extend its route from its present terminus in the village of Greenwich to a village in the adjoining county of Saratoga. Does the language of section 13, when fairly construed, with reference to public policy, as well as to the intent of the statute, confer authority to construct an extension of the route, so as to create a new line of railroad, enabling thereby the company to reach some distant point and to cover new territory for its business operations? I think not. The section, in providing for an alteration or change of the route, or of any part of the route, of its road, or for the location of such route, or any part thereof, in an adjoining county, in my opinion, has reference to the route as fixed originally by the corporate charter and this view finds support in the language, following upon the grant of power, viz.: "if it shall appear to them (the directors) that the line can be improved thereby." The change, or alteration, of route contemplated must be one affecting the line of road as laid out. For reasons bearing upon the convenience, or facility, of operating the road and

of the hauling of its trains, or a better service for the public along the line of the railroad, lateral changes or alterations might be authorized. The power to change the termini, or to locate them in adjoining counties, should be allowed a reasonable operation; not one which would permit what, actually, will be the construction of a new line of railroad in extension of the existing route. The plaintiff's line had been once located between terminal points and if, upon the plea of a change of terminus or route, it may extend its line seven miles further and reach another town, its power must be regarded as only restricted by the territorial limits of the counties adjoining each terminus and indefinite extensions within that area were possible. That in the change of a terminus to an adjoining county some new road will have to be constructed and, therefore, that there is implied, *pro tanto*, the power to construct some extension, may be true; but the reasonable construction, which the language of the statute should receive, and considerations of public policy require that the right to change a terminus should be limited to such other location thereof, as will subserve the operation of the existing road and its particular convenience in the transportation of passengers and of freight as an existing route. Precise, or literal, interpretation of a statute is not to be given, where it is open to construction and where to do so would unduly enlarge the grant of power and militate against a state policy.

I agree with the view expressed in the opinion of the Appellate Division; which, in considering the change as proposed in the petition to be unauthorized by the statute, holds that the change, or improvement, contemplated must be one for the purpose of benefiting the line located by the articles of association and must have reference to some feature of the line itself; such as an easier grade, or a lessened cost of construction and maintenance; not the mere reaching out into another territory for the purpose of increasing the business of the road. A public policy, with respect to the construction of new railroads is declared in section 59 of the Railroad Law; though, of course, by its terms, it is to apply only to railroad

corporations thereafter formed. It is now required that the board of railroad commissioners shall certify that public convenience and a necessity require the construction of a proposed railroad.

The case of *Erie Railroad Co. v. Steward*, (170 N. Y. 172), is not an authority in support of the plaintiff's claim. In that case, the plaintiff sought to condemn to its uses lands in the village of Goshen, for the purpose of traversing the village with other tracks, upon a different alignment. Its purpose was to retain its existing main line and to construct between two points, in a long curve upon the main line, two additional tracks, for greater facility in moving its freight trains; which purpose, if accomplished, would subserve a plan of completing a system of four tracks upon its New York division. The plaintiff's proceeding, there, was rested upon the power conferred in the provisions of subdivision 2 of section 4; subdivision 3 of section 7 and section 13 of the Railroad Law. None of these was deemed to confer the requisite power and with respect to section 13, which alone has any reference to the present case, it was held that the approval of the village trustees must first be obtained before the corporation could proceed to condemn the lands. We considered that, when the company had once located its line of road between terminal points, pursuant to its charter, it was concluded by that location and no change of its route could thereafter be made, in the absence of some legislative authority. In the discussion of the powers conferred by section 13, while holding that they existed for the purpose of altering, or changing, any part of a route, the reference was, obviously, to the route between the terminal points as they had been located. Such an alteration, or change of route, when within a city or a village, required for its authority that the approval of their proper authorities should be first obtained. The question in that case was, as it presents itself to us in the present case, whether the exercise of the power of eminent domain, to take the land in question for the purposes avowed, had been delegated by the legislature through the Railroad Law.

N. Y. Rep.] Dissenting opinion, per O'BRIEN, J.

Our view of the statute, under which the plaintiff claims the right to proceed, is that the avowed purpose of the proceeding is not authorized by any reasonable construction of its provisions and that it would contravene the policy of the state to allow a railroad corporation, proceeding under the grant of power to change or to locate, its route, or terminus, in an adjoining county, to extend its line of road in the manner contemplated here. Such a change must be within reasonable limits and such as may be seen to be an actual improvement of the existing line, in affording to it greater conveniences, or greater facilities, in its operation and management.

For these reasons, I advise the affirmance of the order appealed from, with costs.

O'BRIEN, J. (dissenting). I think the order appealed from should be reversed. The petitioner asked nothing that is not plainly allowed by the statute. Section thirteen of the General Railroad Law permits and provides as follows: "Every railroad * * * may, by a vote of two-thirds of all its directors, alter or change the route or any part of the route of its road or its termini or locate such route, or any part thereof, or its termini, in a county adjoining any county named in its certificate of incorporation, if it shall appear to them that the line can be improved thereby, upon making and filing in the clerk's office of the proper county a survey, map and certificate of such alteration or change." This language is so clear that it would seem to be impossible to mistake its meaning. It is not open to construction. The petitioner seeks to change its terminus at Greenwich, in Washington county, to Schnylerville, in the adjoining county of Saratoga, by extending the road to the latter place, a distance of about seven miles. The directors, by the necessary two-thirds vote, have resolved to make the change in order to improve the line or route. The statute has been literally complied with in every respect, and the only question involved in the case is one of law, and that is, whether the statute authorizes a railroad to change its terminus in one county to a point seven

miles distant in an adjoining county. If the statute does not permit this to be done then it may be asked what does it mean when it says in very plain language that a railroad may change its termini and locate it in an adjoining county?

The only argument against the right of the petitioner to the relief sought to be obtained in this proceeding is that it may, if the statute is given effect according to the plain words employed, so extend its railroad as to make the route longer than it was before by seven miles. Certainly the termini of a railroad cannot be changed to an adjoining county very well without making the route longer or shorter. It is said that the extension, if any, must be a reasonable one. But the legislature has not placed any such limitation upon the statute, since in plain words it authorized the change to a point in an adjoining county; and if the court is to emasculate the statute in that way how can it say that a change involving an extension of seven miles is not reasonable?

It is said that if the plain language of the statute is to be given effect and the extension of seven miles is to be permitted, then the petitioner may by successive extensions into an adjoining county indefinitely extend the length of its railroad. The answer to that suggestion is very obvious and very reasonable. When the petitioner extends its line to Schuylerville it has exercised all the power that the statute confers, and the right to enter an adjoining county is exhausted and cannot be repeated by going into a third or fourth county. The right to change the terminus to an adjoining county does not carry with it the right to keep changing from one county to another indefinitely. That would be an abuse of the power conferred, since the power to change the terminus to an adjoining county does not confer or fairly imply the right to repeat the change from time to time and thus enable a railroad to extend itself all over the state from county to county without other limitation. We ought not to nullify a plain statute from fear that it may be abused when such abuse can be prevented by a reasonable and obvious limitation such as is here suggested.

N. Y. Rep.]

Statement of case.

This court, of course, has nothing to do with the question whether the proposed change will improve the line or not. That question was for the directors to decide and they have decided it, and it is not open to this court to hold that they were wrong in so deciding a question of business in which they were concerned as trustees of the stockholders. This court is concerned only with the question of statutory power and the statute is plain.

In a very recent case a railroad attempted to do practically what the petitioner seeks to do in this case, and we held that it could be done under section thirteen. The only obstacle found in the way of the moving party in the case was that it had not complied with that provision of the section which required the consent of the village trustees. (*Erie Railroad Co. v. Steward*, 170 N. Y. 172.) It is significant that by the terms of section thirteen a railroad is forbidden to abandon any part of its old track, and hence if there can be a change of termini at all it must be accomplished by extending and not contracting the length of the original line of railroads. It seems to us that the statute in plain terms permits the railroad in this case to change its terminus from Greenwich to Schuylerville, and that is all that it asked, and so the order should be reversed and the application granted.

PARKER, Ch. J., BARTLETT and VANN, JJ., concur with GRAY, J.; HAIGHT and MARTIN, JJ., concur with O'BRIEN, J.

Order affirmed.

CAROLINE STEINBACH, Respondent, v. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Appellant.

INSURANCE—ACTION TO REFORM LIFE INSURANCE POLICY AND FOR JUDGMENT THEREON—PARTIES DEFENDANT—CODE CIVIL PROCEDURE, §§ 452 AND 499. Where a life insurance policy was erroneously, or fraudulently, made payable to the insured, or his legal representatives, instead of to a creditor thereof, for whose benefit the policy was obtained and by whom the premiums were paid, the legal representatives of the insured are necessary parties to an action brought by the creditor, after the death of the

insured, against the company to have the policy reformed and made payable to such creditor instead of to the legal representatives of the insured and for judgment upon the policy so reformed for the money due thereunder, and although no attempt was made by defendant to raise the objection, by demurrer or answer, that there was a defect of parties defendant, a motion, made at the close of the evidence upon the trial, to dismiss the complaint for such defect of parties, should have been granted unless within a reasonable time the personal representatives of the insured were brought in, not necessarily for the protection of the defendant, for it had neglected its rights, but for the protection of the representatives of the insured as well as the seemly and orderly administration of justice, that there might be a complete determination of the controversy; since section 499 of the Code of Civil Procedure, providing that where "Such an objection is not taken, either by demurrer or answer, the defendant is deemed to have waived it," must be read in connection with section 452, which provides that "Where a complete determination of the controversy cannot be had without the presence of other parties, the court must direct them to be brought in."

Steinbach v. Prudential Ins. Co., 63 App. Div. 133, reversed.

(Argued October 22, 1902; decided November 18, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 22, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought to reform a policy of life insurance as to the name of the beneficiary and to recover upon it as reformed.

Omitting the formal parts, the allegations of the complaint were that "Prior to the 19th of October, 1896, one Max Fehrman was indebted to the plaintiff (whose name was then Caroline Lampp, she having since married her husband William Steinbach) in divers sums of money which he was unable to pay. Said Fehrman was then insured by the defendant under policies of insurance upon his life for various amounts, the premiums upon which said policies were being then paid by the plaintiff, and constituted a part of the sum then due and owing by the said Fehrman to the plaintiff, all which was known to the defendant. And thereupon, and for the purpose of securing to the plaintiff the payment of the moneys, or a part thereof, then due and owing to her from

said Max Fehrman, the defendant agreed with the plaintiff, in consideration of the premises, and of the payment by the plaintiff of the weekly premiums hereinafter mentioned, to issue a further policy of insurance upon the life of said Fehrman, for the benefit of the plaintiff in the sum of two hundred and seventy dollars, and to make said policy payable to the plaintiff upon the death of said Fehrman.

"Thereafter, on or about the 19th day of October, 1896, in pursuance of said agreement, so made between the plaintiff and defendant, the plaintiff paid the defendant the sum of twenty-five cents, the amount of the first weekly premium above referred to, and the defendant thereupon, in pursuance of said agreement, duly made and executed its policy of insurance in writing and delivered said policy to the plaintiff. The said policy of insurance was dated the 19th day of October, 1896, and declared that in consideration of the application in said policy mentioned, and of the weekly premiums therein stated, namely, the sum of twenty-five cents per week during the life of said Max Fehrman, the defendant promised to pay to the executors, administrators or assigns of the person named as the insured in said policy, to wit, the said Max Fehrman, the sum of One hundred thirty-five dollars, within twenty-four hours after acceptance by it of satisfactory proof of the death of said Max Fehrman during the continuance of said policy, provided said Fehrman should die after the expiration of six months and within one year from the date of said policy, and the sum of two hundred and seventy dollars provided said Fehrman should die after the expiration of one year from said date.

"Upon the delivery of said policy of insurance to the plaintiff, the defendant, by its agent, stated to the plaintiff that the same was issued by the defendant in pursuance of the said agreement, and in conformity therewith, and that by the terms of said policy the defendant did insure the life of said Max Fehrman, and did agree upon his death to pay the amount of said insurance to the plaintiff, upon her paying the premiums called for by the said policy, namely, twenty-five cents per

insured, against the company to have the policy reformed and made payable to such creditor instead of to the legal representatives of the insured and for judgment upon the policy so reformed for the money due thereunder, and although no attempt was made by defendant to raise the objection, by demurrer or answer, that there was a defect of parties defendant, a motion, made at the close of the evidence upon the trial, to dismiss the complaint for such defect of parties, should have been granted unless within a reasonable time the personal representatives of the insured were brought in, not necessarily for the protection of the defendant, for it had neglected its rights, but for the protection of the representatives of the insured as well as the seemly and orderly administration of justice, that there might be a complete determination of the controversy; since section 499 of the Code of Civil Procedure, providing that where "Such an objection is not taken, either by demurrer or answer, the defendant is deemed to have waived it," must be read in connection with section 452, which provides that "Where a complete determination of the controversy cannot be had without the presence of other parties, the court must direct them to be brought in."

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Omitting the formal parts, the allegations of the complaint were that "Prior to the 19th of October, 1896, one Max Fehrman was indebted to the plaintiff (whose name was then Caroline Lampp, she having since married her husband William Steinbach) in divers sums of money which he was unable to pay. Said Fehrman was then insured by the defendant under policies of insurance upon his life for various amounts, the premiums upon which said policies were being then paid by the plaintiff, and constituted a part of the sum then due and owing by the said Fehrman to the plaintiff, all which was known to the defendant. And thereupon, and for the purpose of securing to the plaintiff the payment of the moneys, or a part thereof, then due and owing to her from

N. Y. Rep.]

Statement of case.

said Max Fehrman, the defendant agreed with the plaintiff, in consideration of the premises, and of the payment by the plaintiff of the weekly premiums hereinafter mentioned, to issue a further policy of insurance upon the life of said Fehrman, for the benefit of the plaintiff in the sum of two hundred and seventy dollars, and to make said policy payable to the plaintiff upon the death of said Fehrman.

"Thereafter, on or about the 19th day of October, 1896, in pursuance of said agreement, so made between the plaintiff and defendant, the plaintiff paid the defendant the sum of twenty-five cents, the amount of the first weekly premium above referred to, and the defendant thereupon, in pursuance of said agreement, duly made and executed its policy of insurance in writing and delivered said policy to the plaintiff. The said policy of insurance was dated the 19th day of October, 1896, and declared that in consideration of the application in said policy mentioned, and of the weekly premiums therein stated, namely, the sum of twenty-five cents per week during the life of said Max Fehrman, the defendant promised to pay to the executors, administrators or assigns of the person named as the insured in said policy, to wit, the said Max Fehrman, the sum of One hundred thirty-five dollars, within twenty-four hours after acceptance by it of satisfactory proof of the death of said Max Fehrman during the continuance of said policy, provided said Fehrman should die after the expiration of six months and within one year from the date of said policy, and the sum of two hundred and seventy dollars provided said Fehrman should die after the expiration of one year from said date.

"Upon the delivery of said policy of insurance to the plaintiff, the defendant, by its agent, stated to the plaintiff that the same was issued by the defendant in pursuance of the said agreement, and in conformity therewith, and that by the terms of said policy the defendant did insure the life of said Max Fehrman, and did agree upon his death to pay the amount of said insurance to the plaintiff, upon her paying the premiums called for by the said policy, namely, twenty-five cents per

week and complying with the other conditions thereof, and said defendant did so state and represent to this plaintiff for the purpose of inducing this plaintiff to pay the said premiums, and made such representations intending that the plaintiff should rely thereon, and relying thereon should pay the said premiums accordingly.

"The plaintiff is a Swede and has a very imperfect knowledge of the English language, as spoken, and an especially imperfect knowledge thereof, as written, and did not know until informed thereof by her counsel, after the death of Fehrman, hereinafter mentioned, that said policy of insurance was not payable to her by its terms. On the contrary, the plaintiff believed the said statements made by the defendant, as aforesaid, and relied upon the same, and so believing and relying, paid the said first premium and all subsequent premiums upon said policy of insurance up to the date of the death of said Fehrman hereinafter set forth; and plaintiff believed when she received said policy and paid the first of said premiums and all other premiums, that the same was payable to her, and that she would be entitled to receive the money that should become payable thereunder upon the death of said Fehrman.

"The said statements and representations were false and untrue. The said policy was not payable to this plaintiff as represented by the defendant, nor did the same conform to the said agreement, but instead was payable to the executors, administrators and assigns of the said Fehrman, and gave this plaintiff no interest whatever in any moneys that might become due thereunder, and no rights whatever in respect to said money.

"The words in said policy, 'unto the executors, administrators or assigns of the person named as the insured in this policy,' whereby the same was made payable to the executors, administrators and assigns of said Fehrman, were inserted therein instead of the words 'unto Caroline Lampp, her executors, administrators or assigns,' or similar words, making the same payable to the plaintiff, either by mistake of the defend-

N. Y. Rep.]

Statement of case.

ant or its draftsman, or else they were so inserted, and the statements and representations were made in pursuance of an intent by the defendant to defraud the plaintiff. And the said policy of insurance was accepted in said form by the plaintiff by mistake and upon the supposition and in the belief that the same was payable to her."

No assignment of the policy was alleged or proved. Fehrman died on the 19th of September, 1897, and the usual proof of death was promptly served on the defendant.

The relief demanded was that the name of the plaintiff be substituted in the place of the beneficiaries named in the policy and that she have judgment upon the policy as thus reformed. The answer is substantially a general denial. No attempt was made by the defendant to raise the objection that there was a defect of parties defendant by demurrer or answer, but upon the trial, at the close of the evidence, its counsel moved to dismiss the complaint on the ground, among others, "that there is a defect of parties defendant here; the instrument that is sought to be reformed is payable to Max Fehrman or his executors, administrators or assigns, and neither of those parties nor the next of kin are parties to the action." The motion was denied and the defendant excepted. The trial court found the facts substantially as alleged in the complaint, directed a reformation of the policy as therein demanded and awarded judgment to the plaintiff thereon for the amount claimed. After affirmance by the Appellate Division, two of the justices dissenting, the defendant came here.

William Ogden Campbell for appellant. There was a defect of parties defendant. (Code Civ. Pro. § 452; *Osterhoudt v. Board of Suprs.*, 98 N. Y. 239; *Peyser v. Wendt*, 87 N. Y. 322; *Sherman v. Parish*, 53 N. Y. 483; *Mahr v. N. U. F. Ins. Society*, 127 N. Y. 452; Story's Eq. Pl. ¶ 72.)

Walter Large for respondent. The non-joinder of Fehrman's next of kin has been waived by the defendant. (*Gray v. Schenck*, 4 N. Y. 460; *Sherman v. Parish*, 53 N. Y. 483;

Mahr v. N. U. F. Ins. Society, 127 N. Y. 452; *Osterhoudt v. Board of Suprs.*, 98 N. Y. 239.)

VANN, J. By the judgments below the names of the beneficiaries in a policy of life insurance were stricken out and the name of a stranger substituted as sole beneficiary without making the former parties to the action or giving them an opportunity to be heard. This has been done upon the ground that the insurance company, which is the sole defendant, waived the objection that there was a defect of parties defendant by not taking it either by demurrer or answer as provided by section 499 of the Code of Civil Procedure. That section, however, must be read in connection with section 452, which provides that "The court may determine the controversy, as between the parties before it, where it can do so without prejudice to the rights of others, or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties, the court must direct them to be brought in."

The apparent inconsistency between these sections was the subject of controversy before the courts for a long time, but we think it was dispelled by the judgment in *Osterhoudt v. Board of Supervisors of the County of Ulster* (98 N. Y. 239, 243). That was an action by taxpayers to vacate audits of town accounts for illegality and fraud, and to restrain the levy of a tax for their payment. The persons in whose favor the audits were made were not parties to the action, and while the defendants omitted to raise the objection by demurrer or answer, they raised it upon the trial, where it was overruled. In reversing the judgment rendered in favor of the taxpayers we said: "Construing sections 452 and 499 together, their meaning is that a defendant, by omitting to take the objection that there is a defect of parties by demurrer or answer, waives on his part any objection to the granting of relief on that ground, but when the granting of relief against him would prejudice the rights of others, and their rights cannot be saved by the judgment and the controversy cannot be completely

determined without their presence, the court must direct them to be made parties before proceeding to judgment. When a defendant is sued alone upon a joint contract, if he omits to set up a non-joinder of his co-contractor by demurrer or answer, judgment may pass against him alone, because judgment against one joint contractor will not prejudice the other, but may relieve him from liability. The other branch of the rule would be illustrated by an equitable action brought for the cancellation of a mortgage, executed to two persons as mortgagees, in which only one of the mortgagees was made defendant. The court could not proceed to a decree for the plaintiff without the presence of the other mortgagee. The distinction is between those who are necessary parties and those who are proper parties merely. When persons who are necessary parties are not joined, the court will not proceed until they are brought in. * * * Under the Code the court is bound to take the objection when a proper case is presented."

It was further held that the persons in whose favor the audits had been made were necessary parties, because they were "primarily interested," and the judgment was reversed because they had not been joined.

Referring to section 452 in a still later case (*Mahr v. Norwich Union F. Ins. Socy.*, 127 N. Y. 452, 459), the court said: "While the statute does not in terms prohibit the court from determining the controversy, unless all the necessary parties are brought in, that is impliedly commanded, and is the established practice in all equitable actions." (Citing, among other cases, *Peyser v. Wendt*, 87 N. Y. 323; *Sherman v. Parish*, 53 id. 483; *Van Epps v. Van Dusen*, 4 Paige, 64.)

A court of equity always seeks to do complete justice and to make its judgments so full and comprehensive as to quiet the controversy in all its aspects and as to all persons. Thus every one who is compelled to obey its decrees is protected, further litigation is prevented, and the unseemly spectacle of inconsistent judgments rendered by the same court is avoided.

The plaintiff insists that the rights of the personal repre-

sentatives of Max Fehrman are not prejudiced by the judgment appealed from, because they are not bound by it and can still recover upon the policy, notwithstanding the judgment of reformation rendered in this action. This might lead to inconsistent judgments and a double recovery, which is precisely what section 452 was designed to prevent. Moreover, the hazard of collecting a second judgment in favor of a different plaintiff against the same defendant upon the same cause of action might in some cases be an important consideration and the remoteness of the risk in this case does not affect the principle. The court cannot know how great the risk may be and hence should not permit it, even if it thinks it is remote. A complete determination of a controversy cannot be had when there are persons, not parties, whose rights must be determined, in form at least, at the same time that the rights of the parties to the action are determined. According to the policy under consideration, as it was written, the personal representatives of Mr. Fehrman are entitled to the proceeds, yet the judgment below, rendered without notice to them, takes the policy away from them and gives it to the plaintiff. They had a material interest in the subject-matter of the action, yet they were deprived of it without an opportunity to be heard and were cast in judgment without being sued. While they were not bound by the judgment which does all this in form, still the determination of the controversy is necessarily incomplete because they are not bound. Such a judgment, although not binding, would affect the market value of the policy and tend to prevent a disposition thereof either absolutely or as collateral to a loan. There cannot be a complete determination as to which of two persons is the beneficiary of a life insurance policy without the presence in court of both. The personal representatives of Fehrman were necessary parties and the court should have dismissed the complaint unless within a reasonable time they were brought in, not necessarily for the protection of the defendant as it had neglected its rights, but for their own protection, as well as the seemly and orderly administration of justice.

N. Y. Rep.]

Dissenting opinion, per HAIGHT, J.

The judgment should be reversed and a new trial granted, with costs to abide the event.

HAIGHT, J. (dissenting). I do not think that the provisions of section 452 of the Code of Civil Procedure were intended to cover a case of this character; and I do think that sections 488 and 499 of the Code, to the effect that where it appears upon the face of the complaint that there is a defect of parties, the objection thereto must be taken by demurrer or answer, or else it will be deemed to have been waived by the defendant, have been practically nullified by the construction given by the prevailing opinion. The purpose of this latter section of the Code was to require the question of defect of parties to be raised at the earliest possible moment, either by demurrer or answer, so as to avoid the involving of the plaintiff and the public in the expenses of a long and useless trial upon the merits. If the insurance company can wait until the final close of the trial, and then by motion for direction of a verdict raise the question of defect of parties for the first time in a case of this character, I see no reason why it may not be done in every case; and thereby the express provision of the statute that it should be deemed waived by the defendant becomes of no force or effect, and the county may in every case be subjected to the expense of maintaining a trial upon the merits, when it would have been unnecessary had the objection been seasonably made.

Section 452 of the Code was designed for a different purpose, and, to my mind, is not in conflict with the provisions of section 499. Indeed, we are required to construe the provisions together for the purpose of making one harmonious system of practice. It often occurs upon the trial of cases that the names of persons are disclosed who have an interest in the subject-matter of the litigation, who have not been made parties, and where the defect does not appear upon the face of the complaint. In all such cases the provisions of section 452 apply. The court, therefore, "may determine the controversy, as between the parties before it, where it can do

Dissenting opinion, per HAIGHT, J.

[Vol. 172.]

so without prejudice to the rights of others, or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties the court must direct them to be brought in." Under this provision the court is given the power to determine the controversy, as between the parties before it, unless in doing so it is going to prejudice or destroy the rights of others who are not parties. The recovery of a judgment in this case against the insurance company does not prejudice or destroy the rights of the executor or administrator and assigns of the decedent, if such there be. They have not been made parties to this action, and are not in any way bound by the determination made. Their rights are neither prejudiced nor destroyed. The defendant alone is affected by the judgment. It may, under some remote contingency, be required to pay this insurance again. But this insurance company is not an infant or ward of the court. It is fully able to take care of its own interests, and we need not be concerned therewith. It had the right to save itself from double liability by raising the question of defect of parties by demurrer or answer, but it did not see fit to do so. Instead, it proceeded with the trial. It could have protected itself by giving notice of the bringing of the action to the personal representatives of the decedent, and asking them to defend. It may have done so, and the personal representatives of the decedent may be here defending in the name of the insurance company. We are not advised as to the steps taken by the insurance company to protect itself, nor is it any part of our duty to ascertain. The presence of other persons to the controversy, which the court must direct to be brought in, is fairly illustrated by the case of *Osterhoudt v. Board of Supervisors of Ulster Co.* (98 N. Y. 239). That was a taxpayer's action brought against the board of supervisors to prevent waste, by annulling the audit of the bills of certain individuals, and to restrain the board from levying a tax for their payment, upon the ground that the claims were illegal, inequitable, unjust, false and fraudulent. It will at once be seen that the very purpose of the action

N. Y. Rep.]

Dissenting opinion, per HAIGHT, J.

was to affect the rights of the claimants who were not made parties, by restraining the levying of the tax for their payment. In such a case they were necessary parties, and the court very properly held that they must be brought in.

Again, section 499 of the Code provides a statutory and mandatory rule of pleading. Defect of parties must be raised by demurrer or answer when the defect appears upon the face of the complaint. This rule of pleading is as positive and distinct as the rule that the material allegations of the complaint shall be denied by the answer, or else they shall be deemed admitted; or that the Statute of Limitations must be pleaded or deemed waived. If the courts can disregard this requirement to raise the question by demurrer or answer, they may with equal propriety disregard the requirements for denials of complaints, or of the pleading of the Statute of Limitations.

The complaint in this action demands judgment for the sum of \$135, with interest thereon from September 29th, 1897. This is the final relief sought by the plaintiff. In order to recover this amount the plaintiff asks that the policy be reformed by inserting the plaintiff's name in the place of the executor, administrator and assigns of the decedent. The decedent appears to have been a poor person; unable to pay his board bill, and we are not advised as to whether he left a will or that the same has been proved, or that any administrator has been appointed of his estate. If there has been, he may become a rival claimant with the plaintiff for the insurance. Cases of this character are not uncommon, and wherever rival claimants appear the courts have always permitted the insurance company to interplead them if it so desired. But in no case have I ever heard of its being a ground for dismissal of complaint where the insurance company has, for reasons of its own, neglected to interplead.

This court is, by the Constitution, limited in its judgment to the review of questions of law only. It has no power to review discretionary rulings or orders of the court below. In this case the defendant's counsel, at the close of the testimony,

Statement of case.

[Vol. 172.]

"renewed his motion to dismiss the complaint on the same grounds as stated at the close of the plaintiff's case; and on the further ground that there is a defect of parties defendant." The motion was denied and the defendant excepted. The motion, as we have seen, was to dismiss the complaint, not to stop the trial and have the necessary parties brought in, but to deprive the plaintiff of her cause of action by the dismissal of her complaint. I do not understand that the court could properly have dismissed the complaint upon this ground; the most that it had the power to do was to stop the trial, and to make an order for the bringing in of the necessary parties. Consequently, the exception taken to the refusal to dismiss the complaint presents no error of law upon which this court can properly base a reversal. I, therefore, favor an affirmance.

PARKER, Ch. J., GRAY and BARTLETT, JJ., concur with VANN, J.; O'BRIEN and MARTIN, JJ., concur with HAIGHT, J. Judgment reversed, etc.

AMELIA SULLIVAN, Respondent, v. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Appellant.

INSURANCE—LIMITATION OF ACTION UPON POLICY—WAIVER An action upon a policy of life insurance, which provided that any suit or action thereon should be commenced within six months after the death of the insured, brought after the expiration of such time is barred, unless the provisions of the limitation clause have been waived, although in a previous action, which had been commenced in time, the service of the summons and complaint had been vacated and set aside as unauthorized; the facts that within three or four days after the death of the insured the plaintiff delivered to the defendant the proofs of death, together with the policy and an assignment thereof and that the latter has since retained them, do not establish a waiver.

Sullivan v. Prudential Ins. Co., 63 App. Div. 280, reversed.

(Argued October 23, 1902; decided November 18, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered

N. Y. Rep.]

Statement of case.

August 2, 1901, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

The action was brought by the assignee of a policy of insurance, issued by the defendant upon the life of Patrick J. McGuinness, who died on April 3d, 1895. The defense interposed by the answer, and which furnished the issue for trial, was that the action had not been commenced within six months after the decease of McGuinness, the insured. The clause of the policy, upon which this defense was rested, provides as follows: "No suit or action at law or in equity shall be maintainable with respect to the payment of this policy until after the filing in the principal office of the company of the above mentioned proof of death, nor ~~unless~~ such suit or action shall be commenced within six months next after the decease of the person insured under this policy; and it is expressly agreed that, should any such suit or action be commenced after the expiration of said six months, the lapse of time shall be deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary, notwithstanding." Upon the trial it was established, without dispute, that within three or four days after the death of McGuinness, the insured, the plaintiff delivered to the defendant company the proofs of death, together with the original policy of insurance and the assignment of the same to the plaintiff, and that all of these documents had remained in the possession and control of the defendant since their delivery to it; that a previous action had been commenced by the plaintiff to recover upon the same policy of insurance, by the service of a summons and complaint, on October 3d, 1895, upon an agent of the defendant, which service had been, by an order of the court, vacated and set aside as unauthorized, void and of no effect; that thereafter, on December 26th, 1895, the plaintiff commenced the present action. Upon these facts the plaintiff's counsel asked for the direction of a verdict and the defendant's counsel moved to dismiss the complaint, upon the ground that the cause of action was outlawed before the commencement of the action by the limita-

tion in the contract. The latter motion was denied by the court and a verdict was directed for the plaintiff; to which ruling and direction the defendant duly excepted. The judgment entered upon the verdict, as directed, was affirmed by the Appellate Division, in the second department, and the defendant has appealed to this court.

William O. Campbell for appellant. The action was barred by the limitation in the contract six months after the date of McGuinness' death, April 3, 1895. (*Wilkinson v. F. Nat. Bank*, 72 N. Y. 499; *Dougherty v. Met. L. Ins. Co.*, 3 App. Div. 313; *Arthur v. H. F. Ins. Co.*, 78 N. Y. 162.) There was no waiver by defendant of the period of limitation by contract. (*Titus v. G. F. Ins. Co.*, 81 N. Y. 410; *Dougherty v. Met. L. Ins. Co.*, 3 App. Div. 313; *Arthur v. H. F. Ins. Co.*, 78 N. Y. 462; *Sergent v. L. & L. & G. Ins. Co.*, 155 N. Y. 349.)

Joseph T. Magee and *Seward Baker* for respondent. The appellant was estopped, by its conduct, from pleading the period of limitation in the policy, and had, in fact, waived the same. (*Goodwin v. M. M. L. Ins. Co.*, 73 N. Y. 480; *Prentice v. K. L. Ins. Co.*, 77 N. Y. 483; *Sergent v. L. & L. & G. Ins. Co.*, 155 N. Y. 349; *Dougherty v. Met. L. Ins. Co.*, 3 App. Div. 313; *Mayor, etc., v. H. F. Ins. Co.*, 39 N. Y. 45.) There is evidence in this case to support the decision of the trial court, and the judgment should, therefore, not be disturbed. (*Dillon v. Cockcroft*, 90 N. Y. 649; *Adams v. R. L. Co.*, 159 N. Y. 176; *Smith v. Weston*, 159 N. Y. 194.)

GRAY, J. The only question for our consideration is whether the defendant was estopped by its conduct from insisting upon the limitation clause in the policy and had, thereby, waived the same. The plaintiff claims, and her claim in that respect has been sustained below, that the retention by the defendant of the policy, and of the documents connected therewith and with the proofs of death, justified her in

the assumption and misled her into the belief that its provisions would be waived.

The right of the parties, by their written contract, to prescribe a shorter limitation for its enforcement than that contained in the Code of Civil Procedure cannot be questioned. That right is clearly recognized in section 414; where it is provided that the general provisions of that chapter of the Code should not apply to "a case, where a different limitation is specially prescribed by law, or a shorter limitation is prescribed by the written contract of the parties." (Subdiv. 1.) It was not claimed, and it cannot well be, that the limitation in this contract was unreasonable. The cause of action arose upon the death of the insured and the obligation of the insurer was fixed, if it had not been avoided by some breach of the policy. The commencement of an action to enforce it, unless excused by law, or by the act of the insurer, was reasonably possible and proper within a period of six months thereafter.

But, further, the plaintiff had recognized the force of the obligation upon her and her perfect ability to commence an action within the time prescribed, in bringing her previous action within the contractual period. What then, therefore, is there in the facts which constitutes a waiver on the part of the defendant of the limitation clause? Waiver by a party of any contractual right is a matter of intention. It is not pretended that an intention to waive is to be found elsewhere than in inferences, which are claimed to be deducible from the continued possession by the defendant of the various documents, and they are too shadowy to be entertained in the presence of so distinct a clause. It appears that, on September 16th, 1895, the plaintiff had been notified by letter of the commencement of an action against the defendant by the administratrix of McGuinness, the insured, upon the policy of insurance and that, unless she came in and defended the action, the amount of the policy would be paid to the administratrix. She, then, commenced an action to recover upon the policy on October 3d, 1895, which was within the period of

limitation prescribed. She, thus, showed that the possession of the policy and of the papers was not essential to the commencement of the action. Her action showed that she did not regard their retention by the defendant as indicating any waiver of the limitation clause. If, by deferring her action as long as she did, she placed herself in a position where its dismissal, for the nullity of the service of the summons, was ordered, that is her misfortune. The agreement of the parties was clear; its object was definite and compliance therewith was possible.

In the case of *Arthur v. Homestead Fire Ins. Co.* (78 N. Y. 462), which was an action upon a fire insurance policy, in which was contained a limitation clause of one year, the plaintiff's recovery against the defendant was reversed in this court, upon the ground that the action, having been commenced after the time prescribed therefor in the policy, was too late. In that case, a previous action, commenced within the contractual period, had been abandoned by the plaintiff, who, thereafter, instituted the one which came to this court. The plaintiff there claimed that, because of certain conduct on the part of the defendant's agents, affecting the maintenance of the previous suit, and of the acceptance by the defendant of the costs of the action, which had been abandoned, there had been a waiver by it of the condition of the contract. But the claim was not considered tenable in this court and it was held that these facts could not advantage the plaintiff, or confer any new right against the defendant. In *Wilkinson v. First National Fire Insurance Company*, (72 N. Y. 499), where there was a short limitation in the insurance policy in question, it was claimed that an injunction, restraining the insurance company from paying and the insured from receiving any money on account of the loss of the insured property, until the further order of the court, excused the bringing of an action by the assignee of the policy within the time specified in the policy. The claim was not allowed and the action was held to be barred by the lapse of time. It was observed, in the opinion by Judge ANDREWS,

that "the provision fixing the time within which an action must be brought is distinct, definite and unqualified. The contract contains no saving of the right of action after the expiration of a year from the loss, for any cause whatever; and unless the bringing of the action within the time limited by the contract was waived by the defendant, or was excused and made impossible by the act of God or of the law, the remedy of the plaintiff has been lost." The right to prescribe in a contract a shorter limitation to actions was upheld, as consistent with the policy upon which statutes of limitations are founded, and the right of the party to insist upon the benefit of that feature of the contract was recognized. In *Joyce on Insurance*, (section 3204), the author observes that "the weight of authority seems to support the rule that if a suit is brought within the time provided in the policy, but is dismissed or discontinued for any reason, and a subsequent suit is brought after the expiration of the time limited, though perhaps immediately upon the dismissal or discontinuance of the first suit, the second action cannot be maintained."

In my opinion, the evidence did not disclose any conduct on the part of the defendant, which amounted to a waiver of the limitation clause of the policy, and the plaintiff was in no position, even, to assert that she had been misled by the defendant, in view of having, in fact, commenced one action within the time prescribed.

For these reasons, I advise a reversal of the judgment and the ordering of a new trial, with costs to abide the event.

PARKER, Ch. J., O'BRIEN and BARTLETT, JJ., concur;
HAIGHT, MARTIN and VANN, JJ., dissent.

Judgment reversed, etc.

In the Matter of the Application of THOMAS S. BASSFORD, Appellant, to Have Determined and Enforced a Lien Claimed by him for Legal Services Rendered to GEORGE F. JOHNSON, Respondent.

CONTRACT—CONSTRUCTION OF AGREEMENT AS TO PERCENTAGE UPON AN AWARD FOR LAND TAKEN. Under a written agreement that an attorney at law should receive for his services "ten per cent of whatever award may be obtained for my land," where the title to the land was taken upon a specified date, but the award was not made until nearly four years thereafter, the attorney is entitled to ten per cent upon the interest accrued as well as the principal sum for which the award was made.

Matter of Bassford v. Johnson, 71 App. Div. 617, modified.

(Argued November 10, 1902; decided November 18, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 11, 1902, affirming an order of Special Term denying a motion to determine and enforce a lien for legal services.

The facts, so far as material, are stated in the opinion.

Charles L. Guy for appellant. Upon any theory, the petitioner is entitled to share in the interest, and his compensation cannot be less than ten per cent of the total amount. (*Carpenter v. City of New York*, 44 App. Div. 230; *Devlin v. Mayor, etc.*, 131 N. Y. 125.) The petitioner is entitled to compensation on the basis of an award of \$70,213.26. (*Devlin v. Mayor, etc.*, 131 N. Y. 123; *Matter of Board of Street Opening*, 21 App. Div. 357; *Matter of Nelson Avenue*, 35 App. Div. 406; *Matter of Mayor, etc.*, 40 App. Div. 452.) The compensation of an attorney is protected by a lien upon the cause of action and the proceeds thereof. (*Matter of King*, 168 N. Y. 53.)

Richard M. Bruno for respondent. The awards for the land actually amounted to \$56,238.10, and no more. (*Dev-*

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

lin v. Mayor, etc., 131 N. Y. 123.) The so-called interest was no part of the award for the land, and is distinguishable therefrom. (*Matter of 169th St.*, 40 App. Div. 452.) Independently of the relation which subsisted between the parties, the retainer or agreement is to be construed strongly against the party who framed it. (*Gilbert v. Bank*, 160 N. Y. 549; *Holly v. M. L. Ins. Co.*, 105 N. Y. 437.) The agreement being between attorney and client must be construed favorably to the client. (*Hitchings v. Van Brunt*, 38 N. Y. 335; *Burling v. King*, 46 How. Pr. 452.)

HAIGHT, J. George F. Johnson, the respondent, retained Thomas S. Bassford, the appellant, an attorney at law, to represent him in proceedings instituted by the city of New York for the opening of Leggett avenue over premises owned by the respondent. The retainer was in writing and Johnson agreed to pay Bassford for his services "ten per cent of whatever award may be obtained for my land." On the 23d day of June, 1897, the board of street opening and improvement, pursuant to section 956 of the Consolidation Act, as amended by section 1, chapter 660 of the Laws of 1893, passed a resolution directing that, on the first day of July, 1897, the title of the lands required for the opening of Leggett avenue should vest in the city. Proceedings were thereupon continued before the commissioners of estimate, who, on the 22d day of May, 1901, made their report awarding to Johnson for his lands the sum of \$56,238.10. Upon this sum Johnson was entitled to interest from the date of the vesting of the title in the city, which amounted to the sum of \$13,975.16, making a total of \$70,213.26. The Special Term awarded to Bassford a lien of ten per cent upon the amount of the award of \$56,238.10, and denied his application for a lien upon the amount of the interest accrued, and it is this claim for a lien upon the interest which is now brought up for review.

The retainer being in writing, the question raised must be determined from a construction of that instrument. By its terms, the attorney was to receive for his services ten per cent

Statement of case.

[Vol. 172.]

of whatever award may be obtained for Johnson's land. The title to the land was taken, as we have seen, by the city on the first day of July, 1897, and if the award had been then made the attorney unquestionably would have been entitled to ten per cent thereof and the interest thereon that thereafter accrued down to the date of the payment, but the award was not made until nearly four years thereafter. But when made it was for the value of the land at the time that the title was taken by the city, and, therefore, so far as interest is concerned, the award is deemed to have been made of that date, so that the effect is the same as if the award had been made on that day and the payment postponed for four years thereafter. We, consequently, are of the opinion that, under the retainer, Bassford was entitled to his ten per cent upon the interest accrued as well as the principal sum for which the award was made.

The order of the Appellate Division and that of the Special Term should be modified so as to establish the appellant's lien of ten per cent upon the entire sum of \$70,213.26, and as modified affirmed, with costs to the appellant.

PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN, VANN and CULLEN, JJ., concur.

Ordered accordingly.

172 490
78 AD 548

AMELIA WEBER, Respondent, v. THE SUPREME TENT OF THE
KNIGHTS OF THE MACCABEES OF THE WORLD, Appellant.

INSURANCE — UNREASONABLE AMENDMENT OF BY-LAWS DEPRIVING BENEFICIARY OF RIGHTS UNDER POLICY ISSUED BY MUTUAL BENEFIT SOCIETY. A mutual benefit society which has insured a member against unintentional self-destruction after one year, cannot, by a subsequent amendment of its by-laws providing in effect that self-destruction while insane within five years from the date of the policy should render it void, deprive the beneficiary of his rights under the contract, since such amendment is unreasonable.

Weber v. Supreme Tent K. of M., 61 App. Div. 613, affirmed.

(Argued October 24, 1902; decided November 18, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 8, 1901, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

James L. Quackenbush for appellant. The amendment changing the period from one to five years during which suicide would work a forfeiture of death benefit was reasonable and interfered with no vested right of plaintiff or her husband. (*Supreme Court v. Hammers*, 81 Ill. App. 561; *Hughes v. Odd Fellows*, 98 Wis. 292; *Hale v. E. A. Union*, 168 Penn. St. 377; *Chambers v. Supreme Tent*, 200 Penn. St. 244; *People ex rel. v. Grand Lodge*, 32 Misc. Rep. 528; *Schmidt v. Supreme Tent*, 97 Wis. 528; *Loeffler v. Modern Woodmen*, 75 N. W. Rep. 1012; *Dorns v. Supreme Lodge*, 75 Miss. 466; *Supremes Com. K. of G. v. Ainsworth*, 71 Ala. 436; *Poultney v. Bachman*, 31 Hun, 49.)

George D. Forsyth for respondent. The by-law attempted to be passed was an unreasonable one, and, therefore, not one which the court will enforce. (*Kent v. Mining Co.*, 78 N. Y. 183; *McNiel v. S. T. M. A.*, 92 N. Y. S. R. 119; *F. L. & T. Co. v. Aberle*, 80 N. Y. S. R. 10; *Weiler v. E. A. Ins. Society*, 92 Hun, 277; *Spencer v. G. L. A. O. U. W.*, 82 N. Y. S. R. 590; *Roberts v. G. L. A. O. U. W.*, 104 N. Y. S. R. 59; *Weber v. Sup. Tent K. O. T. M.*, 104 N. Y. S. R. 1150; *Mathews v. Asso. Press*, 136 N. Y. 342; *Wynehamer v. People*, 13 N. Y. 378.) The by-law sought to be enforced interfered with a vested right of Frederick Weber, and is, therefore, void. (*Kent v. Mining Co.*, 78 N. Y. 159; *Englehardt v. Loan Assn.*, 148 N. Y. 281; *McNiel v. S. T. M. Assn.*, 40 App. Div. 581; *Weber v. Sup. Tent*, 104 N. Y. S. R. 1150; *Roberts v. G. L. A. O. U. W.*, 104 N. Y. S. R. 59; *Spencer v. G. L. A. O. U. W.*, 82 N. Y. S. R. 500; 5 Am. & Eng. Ency. of Law [2d ed.], 96; *Ill. F. College v. Cooper*, 25 Ill. 123.)

PARKER, Ch. J. The judgment in this action awards \$2,000 to plaintiff as beneficiary under a policy of insurance issued to her husband by defendant, a fraternal mutual benefit society organized upon the lodge plan. The defense interposed was that the insured took his own life and hence a recovery could not be had because at the time of his death the by-laws and rules of the order provided that should an insured commit suicide within five years from the time of admission into the order, whether sane or insane, the contract should be void. At the time Weber joined the order and received his policy the rules of defendant and the contract of insurance provided that the contract should be void if the party committed suicide within one year, whether sane or insane. Before Weber's death defendant undertook to amend its by-laws and rules so as to extend the time from one year to five within which self-destruction, whether the result of an insane act or an intentional one, should operate to destroy the policy, and it insists the amendment was legally accomplished, and that the self-destruction of the insured within the five years, although an insane act, operated to deprive this plaintiff of all right of recovery. Plaintiff challenges the alleged amendment and insists that it was not legally accomplished, and hence is not available as a defense. But the disposition which we deem it necessary to make of this appeal renders it unnecessary to pass upon that question, and hence we shall assume, without deciding, that defendant took all the steps necessary to bring about this change in its laws.

This brings us directly to the question whether defendant had the power, by amendment long subsequent to the taking out of the policy by its member, to deprive his beneficiary of all rights under the policy in the event of unintentional self-destruction on the part of the insured, for in the eye of the law the taking of life by an insane person, whether it be his own or that of some other person, is not an act for which he is responsible. In the Century Dictionary a suicide is defined to be: "One who commits suicide; at common law, one who, being of the years of discretion and sound mind, destroys him-

self." And the act itself is defined to be, "designedly destroying one's own life. 'To constitute suicide at common law the person must be of years of discretion and of sound mind.'" This distinction was evidently in the minds of the draftsmen of the rules of the defendant, for they provided that members who should commit suicide within one year from the time of their admission, whether sane or insane, should not secure to others any benefits from the membership. It was entirely competent of course for defendant to provide in the contract between it and its members that there should be no recovery in the event that within a given period the insured should take his own life although insane, and it could as well have provided that the effect of a death by consumption should be to avoid the policy and deprive it of all force, and the same could be said of typhoid fever or any other disease; but it did not see fit to include any of those diseases nor even unintentional self-destruction after a period of one year.

The query, therefore, is whether one who has become a member of this order and entered into a contract with it may be deprived of rights under it by a subsequent amendment of the by-laws providing that *unintentional* self-destruction shall avoid the policy. It needs no amendment to the by-laws to accomplish that result where a person of sound mind deliberately takes his own life, for in such case, as the Supreme Court of the United States held in *Ritter v. Mutual Life Ins. Co.* (169 U. S. 139), it is an implied condition of a policy that the insured will not purposely when in sound mind take his own life, but will leave the event of his death to depend upon some cause other than deliberate, willful self-destruction. So if the proof were that this defendant while of sound mind intentionally took his own life, there could be no recovery although the policy were silent upon the subject. But *unintentional* self-destruction, whether due to insanity or accident, after the lapse of a year from the making of the contract, was as much insured against as death from typhoid fever or consumption, and an amendment to its by-laws providing that the death of an existing member from any of these causes

should render the policy void would deprive the party of vested contract rights. An amendment which effects such a result, we have recently held, may not be made because it is an unreasonable amendment destroying contract rights instead of regulating the administration of the corporation and its membership within reasonable bounds. (*Parish v. N. Y. Produce Exchange*, 169 N. Y. 34.)

The division line between proper and improper amendments and the authorities bearing thereon were sufficiently considered in that case. In this one it suffices in conclusion to say that this defendant cannot, by amendment to its rules, deprive persons already insured or their beneficiaries of their rights under contracts of insurance in the event that death shall ensue from specified causes necessarily insured against by the original contract. This contract insured Weber against unintentional self-destruction after one year and defendant had not the power to take away the right thus secured without his consent. As against him and the beneficiary under his contract, therefore, that part of the amendment which provided in effect that self-destruction while insane within five years from the date of the policy should render the policy void, was unreasonable and ineffectual.

The judgment should be affirmed, with costs.

GRAY, O'BRIEN, BARTLETT, MARTIN and VANN, JJ., concur; HAIGHT, J., not voting.

Judgment affirmed.

In the Matter of the Accounting of UNION TRUST COMPANY
OF NEW YORK, Respondent, as Trustee of the Estate of
GEORGE P. LAWRENCE, Deceased.

LAWRENCE CRAUFURD et al., Appellants.

APPEAL—ORDER OF APPELLATE DIVISION CANNOT BE REVIEWED UPON APPEAL TAKEN DIRECT FROM DECREE OF SURROGATE'S COURT MADE AFTER AND IN ACCORDANCE WITH SUCH ORDER. An order of the Appellate Division modifying a decree of a Surrogate's Court is not reviewable by the Court of Appeals upon an appeal taken directly from a decree of a Surrogate's Court made and entered after, and in accordance

N. Y. Rep.]

Statement of case.

with, such order, notwithstanding the notice of appeal gives notice of an intention to bring such order up for review, since the order is not only not an intermediate order of the Appellate Division, but is a final order and can only be brought up by direct appeal therefrom or by appeal from a final judgment or order of the Appellate Division affirming the decree of the Surrogate's Court entered after and in accordance with the order sought to be reviewed.

Matter of Union Trust Co., 70 App. Div. 5, appeal dismissed.

(Argued November 11, 1902; decided November 18, 1902.)

APPEAL from a decree of the New York County Surrogate's Court, entered April 10, 1902, upon an order of the Appellate Division of the Supreme Court in the first judicial department, which modified and affirmed as modified a decree of such Surrogate's Court settling the account of the Union Trust Company as trustee of the estate of George P. Lawrence, deceased.

The Union Trust Company of New York city commenced this proceeding on March 15, 1901, in the Surrogate's Court of New York county to secure a judicial settlement of its account as trustee under the will of George P. Lawrence, deceased. A final decree was had therein on September 6, 1901. The Union Trust Company appealed to the Appellate Division from so much of the decree as denied its right to commissions both as executor and trustee. The Appellate Division modified the surrogate's decree by awarding the trust company commissions in both capacities, and as thus modified affirmed the decree.

The appellants in their notices of appeal appealed from the judgment or decree of the Surrogate's Court entered April 10, 1902, upon the order of the Appellate Division modifying the decree of the surrogate, dated September 6, 1901, but they did not appeal from that order. The notices of appeal also stated that the appellants intended to bring up for review three other previous decrees of the surrogate, made in the same proceeding, and then concluded with the statement that they also intended to bring up for review the order of the Appellate Division which reversed or modified the decree of the Surrogate's Court.

Rastus S. Ransom, Edwin C. Ward and William B. McNeice for appellants.

Wheeler H. Peckham and *Hoffman Miller* for respondent. The appeal must be dismissed, as there is no provision of law permitting an appeal from a decree of a Surrogate's Court. (Code Civ. Pro. §§ 190, 1316, 1325, 2570, 2571.)

Per Curiam. We are of the opinion that the notice of appeal to this court was insufficient to effect an appeal from the final order of the Appellate Division modifying the surrogate's decree of September 6, 1901. The appeal was taken directly from the judgment or decree of the Surrogate's Court, which was entered after the decision of the Appellate Division, and not from the order of that court. This procedure was unauthorized, as this court has jurisdiction to review only actual determinations of the Appellate Division. It is true that the appellants in their notice of appeal gave notice of an intention to bring up for review several decrees of the Surrogate's Court, and also the order of reversal entered and filed in the office of the Supreme Court, Appellate Division, in March, 1902. While section 1301, Code of Civil Procedure, provides that where the appeal is from a final judgment, or final order in a special proceeding, and the appellant intends to bring up for review an intermediate order, he must specify the order to be reviewed, still the order sought to be thus reviewed was not only not an intermediate order of the Appellate Division, but was a final order, and could only be brought up by direct appeal. Moreover, as there was in this case no direct appeal from any judgment or final order that was reviewable here, there was no appeal which would justify a notice of the review of any intermediate or incidental order. It follows, therefore, that this court is without authority to review the order of the Appellate Division on this appeal. (*Ansonia Brass & Copper Co. v. Conner*, 98 N. Y. 574.)

If this were otherwise, and we had jurisdiction to pass upon the question presented, we should be of the opinion that the

N. Y. Rep.]

Statement of case.

learned Appellate Division correctly decided the case, and that it should be affirmed.

The appeal should be dismissed, with costs payable out of the portions of the estate to which the appellants Robert B. Craufurd and Lawrence Craufurd are entitled.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and CULLEN, JJ., concur; VANN, J., absent.

Appeal dismissed.

CONNECTICUT TRUST AND SAFE DEPOSIT COMPANY, Appellant,
v. CHARLES K. WEAD et al., Respondents.

1. STATUTE OF LIMITATIONS—OUTLAWED CLAIM NOT REVIVED BY LETTER OF DEBTOR OFFERING TO BUY IT FOR A SMALL SUM. The liability of an indorser of a note, outlawed by lapse of time, is not revived by a letter from him to the holder of the note stating, in substance, that he is unable to pay the note and offering to buy it, if the holder will sell it for some small sum that he can, in justice to other interests, afford to pay; since such letter contains no promise to pay the note nor is it an acknowledgment of an existing debt.

2. SAME—OPERATION OF, SUSPENDED BY NON-RESIDENCE OF DEBTOR, NOTWITHSTANDING CASUAL VISITS TO THE STATE. Where a person removed from the State of New York to another state after a cause of action had accrued against him and has since resided in the latter state, such absence suspends the running of the Statute of Limitations against him, notwithstanding the fact that he has made a number of brief visits to the city of New York or to his old residence within this state; the amendment of 1888, changing section 401 of the Code of Civil Procedure so that it reads, "departs from and resides without the State and remains continuously absent therefrom," instead of "*or* remains continuously absent therefrom," did not alter the rule that non-residence is absence, and that casual visits to the state do not destroy the continuity of the absence.

Connecticut Trust & S. D. Co. v. Wead, 58 App. Div. 498, modified.

(Argued October 18, 1902; decided November 18, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 8, 1901, upon an order affirming a judgment in favor of defendant Leslie C. Wead entered upon a dismissal of the complaint as to him by the court at a Trial Term, and revers-

ing a judgment against the defendant Charles K. Wead entered upon a verdict directed by the court and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

George H. Yeaman and *Edward M. Bassett* for appellant. The letter sent to the plaintiff by the defendant Charles K. Wead was an acknowledgment, and barred the statute. (*Manchester v. Braedner*, 107 N. Y. 346; *Kahn v. Crawford*, 28 Misc. Rep. 572; *Wright v. Parmenter*, 23 Misc. Rep. 629; *Fletcher v. Daniels*, 52 App. Div. 67.) As to defendant Leslie C. Wead, during his residence in Massachusetts, the operation of the statute was suspended, notwithstanding his casual returns to this state. (Code Civ. Pro. § 401; *Burroughs v. Bloomer*, 5 Den. 532; *McCord v. Woodhull*, 27 How. Pr. 54; *Helmer v. Minot*, 56 N. Y. S. R. 764; *Bassett v. Bassett*, 55 Barb. 505; *F. Nat. Bank v. Bissell*, 7 N. Y. Supp. 53; *Simonson v. Napis*, 36 App. Div. 473; *Riker v. Curtis*, 17 Misc. Rep. 134; *Costello v. Downer*, 19 App. Div. 434; *Engel v. Fischer*, 102 N. Y. 400; *Palmer v. Bennett*, 83 Hun, 220.)

Robert K. Waller for respondents. There was no sufficient acknowledgment of an indebtedness to take it out of the Statute of Limitations. (*Hancock v. Bliss*, 7 Wend. 267; *Allen v. Webster*, 15 Wend. 284; *Bloodygood v. Bruen*, 8 N. Y. 362; *Manchester v. Braedner*, 107 N. Y. 346; *Fletcher v. Daniels*, 52 App. Div. 67, 69; *Davis v. Noyes*, 61 Hun, 87; *Cudd v. Jones*, 63 Hun, 142; *Hartley v. Requa*, 17 Misc. Rep. 74; *Shaw v. Lambert*, 14 App. Div. 265; *Wright v. Parmenter*, 23 Misc. Rep. 629.) Where the promise is conditional it must be shown that the condition has been performed. (*Cocks v. Weeks*, 7 Hill, 45; *Bush v. Barnard*, 8 Johns, 408; *Wakeman v. Sherman*, 9 N. Y. 85; *Watkins v. Johns*, 63 Hun, 106.) An offer to compromise a claim will not take a case out of the Statute of Limitations.

N. Y. Rep.] Opinion of the Court, per CULLEN, J.

(*Bush v. Barnard*, 8 Johns. 408; *Lawrence v. Hopkins*, 13 Johns. 288; *Allen v. Webster*, 15 Wend. 284; *Cudd v. Jones*, 63 Hun, 142; *Hartley v. Requa*, 17 Misc. Rep. 74; *Shaw v. Lambert*, 14 App. Div. 265.) Under section 401 of the Code of Civil Procedure, as amended in 1888, the claim as to defendant Leslie C. Wead is barred by the Statute of Limitations. (*Burroughs v. Bloomer*, 5 Den. 532; *Ford v. Babcock*, 2 Sandf. 518; *Didier v. Davison*, 2 Barb. Ch. 477; *Cole v. Jessup*, 10 N. Y. 96; *Denny v. Smith*, 18 N. Y. 567; *Bassett v. Bassett*, 55 Barb. 518; *McCord v. Woodhull*, 27 How. Pr. 54; *Bennett v. Cook*, 43 N. Y. 537; *Ulmer v. Butterfield*, 17 J. & S. 515; *F. Nat. Bank v. Bissell*, 7 N. Y. Supp. 53.)

CULLEN, J. The action was brought in April, 1900, against the two defendants as indorsers of a promissory note which matured February 14th, 1890. Both defendants pleaded the Statute of Limitations. The defendant Charles K. Wead was a resident of the state at the time the cause of action accrued and remained such until the commencement of the action. The plaintiff sought to avoid the bar of the statute by proof of the receipt of the following letter:

“251 PATENT OFFICE,

“WASHINGTON, D. C., Dec. 27, '97.

“CONN. TRUST & S. D. Co.

“Hartford, Conn.

“MR. M. H. WHAPLES, *Pt.*:

“DEAR SIR.—Several years ago when the Hartford Dynamic Co. went into insolvency you held a partly paid note of the company indorsed by me and L. C. Wead. I am not yet able to take up the note, and have no definite prospect of being able to do so for a long time to come; but if you are disposed to name some small sum that you will take for the note I shall be glad if I can do so in justice to other interests to buy it.

“Very truly yours,

“CHARLES K. WEAD.”

The learned trial court held that this letter was a sufficient acknowledgment or promise within section 395 of the Code of Civil Procedure and directed a verdict for the plaintiff against this defendant. The Appellate Division by a divided court held the letter insufficient for the purpose and ordered a new trial. From that order the plaintiff has appealed to this court, giving the necessary stipulation.

We agree with the view of the majority of the Appellate Division. At the time the defendant wrote the letter to the plaintiff the claim was outlawed by the lapse of time. "The rule with us is, that to revive a demand thus barred, there must be an express promise to pay, either absolute or conditional, or an acknowledgment of the debt as subsisting, made under such circumstances that such a promise may be fairly implied." (*Wakeman v. Sherman*, 9 N. Y. 85.) "It seems to be the general doctrine that the writing, in order to constitute an acknowledgment, must recognize an existing debt, and that it should contain nothing inconsistent with an intention on the part of the debtor to pay it." (*Manchester v. Braedner*, 107 N. Y. 346.) Tested by these rules the letter plainly contains no promise to pay the note, nor does it seem to us to be the acknowledgment of an existing debt. At most it is an admission that at one time there existed a liability from the defendant to the plaintiff. But this liability was then barred by the lapse of time. There is no promise to pay the claim, but on the contrary an assertion that the writer was not then able to take up the note, and that he had no prospect of being able to do so. He then made a qualified offer to buy the note if the holder was willing to sell it for some small sum, and he, the debtor, could do so in justice to other interests. A comparison of the letter in this case with that found in *Tebo v. Robinson* (100 N. Y. 27) will show how far the instrument now before us falls short of the one on which the action in the case cited was brought. Yet there it was held that the promise of the defendant was conditional.

The question presented by the non-residence of the defendant Leslie C. Wead is not free from doubt. In April, 1890,

N. Y. Rep.] Opinion of the Court, per CULLEN, J.

he left Malone in this state and took up his residence in Massachusetts, where he has since resided. During this time he made a number of brief visits either to the city of New York or to his former residence. The statutory provisions as to the exceptions from the bar of the statute caused by non-residence or departure from the state have been the subject of a number of alterations, at times in substance, and at other times merely in form. Section 401 of the Code of Civil Procedure before the amendment in 1888 read: "If, when the cause of action accrues against a person, he is without the state, the action may be commenced within the time limited therefor, after his return into the state. If, after a cause of action has accrued against a person, he departs from and resides without the state, or remains continuously absent therefrom for the space of one year or more, the time of his absence is not a part of the time limited for the commencement of the action. But this section does not apply, while a designation, made as prescribed in section 430, or in subdivision 2 of section 432, of this act, remains in force." In 1888, however, the section was changed so that it thereafter read "departs from and resides without the state *and* remains continuously absent therefrom," instead of "or remains continuously absent therefrom." After this amendment it was held by this court in *Hart v. Kip* (148 N. Y. 306) that to effect a suspension of the statute there must be both residence without the state and the party must be continuously absent therefrom for one year or more. So it was decided that the statute ran in favor of a defendant who was absent from the state for more than a year but continued to be a resident. But that decision does not dispose of the present case. It does not determine the interpretation to be given to the term "absence." It must be borne in mind that before the amendment of the section this provision dealt with two different cases, one that of a defendant who might become a non-resident, the other a defendant, who remaining a resident might absent himself from the state for more than a year. When the section prescribed that the time of the defendant's "absence" should not be part of the

time limited for the commencement of the action, such absence included two different conditions, physical absence in the case of a resident, and residence without the state in the case of a non-resident. Under a number of cases decided, it is true, not under the present Code, but under earlier statutory enactments of similar character, it was clearly settled by authority that to set the statute running in the case of an absent debtor his return to the state must be "so public, and under such circumstances, as to give the creditor an opportunity, by the use of ordinary diligence and due means, of arresting the debtor" (*Fowler v. Hunt*, 10 Johns. 464), and that successive absences could be accumulated and the aggregate deducted from the statutory period. (*Burroughs v. Bloomer*, 5 Denio, 532; *Ford v. Babcock*, 2 Sandf. S. C. R. 518; *Cole v. Jessup*, 10 N. Y. 96.) *Burroughs v. Bloomer* went further and it was there held: "The expressions 'and reside out of the state' and 'the time of his absence' have the same meaning; they are correlative expressions. So that while the defendant in this case resided out of it, he was absent from the state, and accordingly, until he again became a resident of the state, the suspension of the operation of the statute continued." The case was cited with approval in *Cole v. Jessup* (*supra*), but as authority for other propositions than the one which I have excerpted from the opinion. The doctrine quoted, however, was followed by the Supreme Court in the case of *McCord v. Woodhull* (27 How. Pr. 54) and *Bassett v. Bassett* (55 Barb. 505). In each of these cases the defendant was a resident of New Jersey doing business in the city of New York and attending there on secular days. It was held that the statute did not run in his favor. I have found no subsequent case holding a contrary rule. The question came before this court in *Bennett v. Cook* (43 N. Y. 537), which was also the case of a resident of New Jersey doing business in the city of New York and present there during business hours. It was not, however, determined, for the court said that on no theory could the plaintiff claim a presence in the state of more than ten hours out of the twenty-four, the aggrega-

N. Y. Rep.] Opinion of the Court, per CULLEN, J.

tion of which would fall far short of the period requisite to bar the claim. *Engel v. Fischer* (102 N. Y. 400) does not bear on the question. There the defendant continuously resided within the state, though under a fictitious name. It seems, therefore, that at the time of the amendment of 1888, non-residence was absence within the meaning of the statute. The change of the statute by eliminating from the exception the case of a resident of the state does not require or justify giving a different construction to the term "absence" when applied to a non-resident from that which was formerly attributed to it. By the substitution of the word "and" for "or" it became thereafter necessary to bring a non-resident within the exception of the statute that he should be continuously absent for a year or more, that is to say, a non-residence for less than a year continuously would be insufficient for the purpose. But it did not alter the rule that non-residence is absence, and that casual visits to the state do not destroy the continuity of the absence. In *Bassett v. Bassett* (*supra*) it was said: "The object of the exception is to give the plaintiff the whole of six years' residence within the state to commence his action. He is not obliged to follow the debtor into another state; nor is he called upon to watch him and ascertain whether he comes into the state for a temporary purpose, so long as his residence is elsewhere." We think this statement is still correct. Whether the statute runs in favor of a non-resident defendant with a place of business in this state and daily present there during business hours it is unnecessary to determine, but we hold that the casual temporary visits of a non-resident to this state do not break the continuity of his absence under the section of the Code so as to entitle him to the benefit of the statute. The difference between the status of an absent resident and that of a non-resident and the ability of a creditor to pursue them is marked. The former, owing allegiance to the state and subject to its laws, can be reached by its process, even though it be not personally served upon him (*Hunt v. Hunt*, 72 N. Y. 217), while the state has no power to render a personal judgment against a non-resident

unless he be served with process within the state, and by the Code (sec. 1217) no judgment of any kind can be entered against a non-resident served by publication unless the plaintiff has succeeded in attaching property.

The order of the Appellate Division granting a new trial to the defendant Charles K. Wead should be affirmed and judgment absolute rendered for that defendant, under the plaintiff's stipulation, with costs. The judgments of the Appellate Division and of the Trial Term in favor of the defendant Leslie C. Wead should be reversed and a new trial granted, costs to abide the event.

PARKER, Ch. J., GRAY, BARTLETT, MARTIN and WERNER, JJ., concur; HAIGHT, J., absent.

Ordered accordingly.

ABRAHAM VAN SICLEN, Appellant, Impleaded with Another,
v. THE CITY OF NEW YORK, Respondent.

APPEAL — WHEN JUDGMENT OF MODIFICATION BY APPELLATE DIVISION, WHICH IS IN EFFECT A REVERSAL, SHOULD GRANT A NEW TRIAL. The Appellate Division has no power to modify a judgment of the Special Term, which awarded a separate item of damages to one of the plaintiffs, by striking out such award of damages, thus in effect reversing that part of the judgment, without granting a new trial as to such plaintiff, in a case where the facts may be changed upon a new trial, and this court will modify the judgment of the Appellate Division in that respect by granting a new trial only as to the plaintiff affected thereby, where that can be done without interfering with the rights of the other plaintiff.

Van Siclen v. City of New York, 64 App. Div. 437, modified.

(Argued October 27, 1902; decided November 25, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 16, 1901, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

N. Y. Rep.] Opinion of the Court, per WERNER, J.

Frank Harvey Field for appellant. It was error to reverse the judgment in favor of Abraham Van Sieten on the ground that he was not in possession of the property, and did not have the beneficial enjoyment thereof. (*Kernochan v. N. Y. E. R. R. Co.*, 128 N. Y. 565.)

George L. Rives, Corporation Counsel (*James McKeen* of counsel), for respondent.

WERNER, J. At the time of the trial of this action, and for a number of years prior thereto, the plaintiffs were the owners of separate tracts of improved farm lands situate on opposite sides of Lincoln avenue in that part of the borough of Queens in the city of New York which was formerly known as the village of Jamaica. This action was brought to restrain the defendant from maintaining an alleged nuisance in Lincoln avenue in front of said premises, and to recover damages occasioned thereby. The nuisance complained of was caused by an excavation made in Lincoln avenue for the purpose of repairing a defective sewer, and the negligence of the defendant's officers in permitting this excavation to remain open and obstruct the highway for the passage of teams to and from the plaintiff's lands. At Special Term an injunction was granted, the plaintiff James Van Sieten was awarded the sum of \$500.00 damages and the plaintiff Abraham Van Sieten was awarded the sum of \$2,850.00 damages, with an additional allowance of costs to each. The defendant appealed from that portion of the Special Term judgment which awarded money damages and an allowance of costs, and the Appellate Division modified the judgment by striking out so much thereof as awarded damages to the plaintiff Abraham Van Sieten, and as so modified affirmed it. The order of the Appellate Division does not state whether this modification was upon the facts or the law.

The plaintiff Abraham Van Sieten is the only appellant here, and he challenges the correctness of the judgment of the Appellate Division so far as it affects him. The decision of

the trial court was in the short form. It stated that the plaintiff Abraham Van Siclen was the owner of and resided upon one of the farms in question, conducting the business of market gardening thereon. As indicated in its opinion, the Appellate Division took a different view of the evidence upon this branch of the case, and concluded that Abraham Van Siclen did not occupy the particular portion of the farm owned by him affected by the nuisance, but that the same was occupied by his son, and, as the nuisance complained of was temporary in character, the damages caused thereby could not be recovered by Abraham Van Siclen, the reversioner, because they belonged to his son, the lessee. The law upon this question has so recently been settled in the case of *Bly v. Edison Electric Illuminating Co.* (172 N. Y. 1) that it need not be discussed here. The difficulty upon the present appeal lies in the form in which the case comes to us. The obvious effect of the so-called modification of the judgment herein by the Appellate Division was to reverse the judgment of the Special Term so far as it awarded damages to the plaintiff Abraham Van Siclen. The order of reversal is silent as to the grounds upon which it was made and must, therefore, be presumed to be based upon errors of law and not of fact. (Sec. 1338, Code Civ. Pro.) The record is in such condition that it is impossible to say that the plaintiff cannot succeed upon another trial and, therefore, in reversing the judgment of the Special Term as to the plaintiff Abraham Van Siclen the Appellate Division should have granted a new trial as to him. This could have been done without affecting the rights of the other parties to the action. (*Wilson v. Mechanical Orguinette Co.*, 170 N. Y. 542.)

The judgment of the Appellate Division should, therefore, be modified by directing that a new trial be had as between the plaintiff Abraham Van Siclen and the defendant and, as thus modified, the same is affirmed, with costs to abide the event.

GRAY, MARTIN and CULLEN, JJ., concur; O'BRIEN and VANN, JJ., not voting; PARKER, Ch. J., absent.

Judgment accordingly.

EDWARD D. COSSELMON, Respondent, v. JOHN DUNFEE et al.,
Appellants.

NEGLIGENCE—PRACTICE OF ASKING WITNESSES QUESTIONS, WHICH COUNSEL KNOWS CANNOT BE ANSWERED, CONDEMNED. The practice in negligence cases of asking a witness a question which counsel must be assumed to know cannot be answered—in this case, as to whether defendants carried insurance for accident to their employees—is highly reprehensible, and where the trial court or Appellate Division is satisfied that the verdict of the jury has been influenced thereby it should for that reason set aside the verdict.

Cosselmon v. Dunfee, 59 App. Div. 467, affirmed.

(Argued November 19, 1902; decided November 25, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 21, 1901, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

This action was brought to recover for personal injuries alleged to have been caused by the negligence of the defendants.

Theodore E. Hancock for appellants.

F. D. Wright for respondent.

Per Curiam. We affirm this judgment without opinion, but feel constrained to refer to an occurrence on the trial that has become too frequent in negligence cases.

Counsel for plaintiff asked a witness for defendants this question: "Do you know whether they carry insurance for accident to their employees?" This question was objected to as incompetent and objection sustained.

While the learned trial judge made a proper disposition of the matter, nevertheless the propounding of the question was calculated to convey an improper impression to the jury.

The inquiry into the matter of insurance is not material and the practice of asking a question that counsel must be assumed

Statement of case.

[Vol. 172.]

to know cannot be answered is highly reprehensible, and where the trial court or Appellate Division is satisfied that the verdict of the jury has been influenced thereby it should, for that reason, set aside the verdict.

The judgment and order should be affirmed, with costs.

PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

Judgment and order affirmed.

NELLIE A. G. VOUGHT, Appellant, v. EASTERN BUILDING AND
LOAN ASSOCIATION OF SYRACUSE, Respondent.

1. BUILDING AND LOAN ASSOCIATIONS — WHEN SHAREHOLDER MAY RECOVER AMOUNT NAMED IN CERTIFICATE OF STOCK. Where a certificate of stock, issued by a building and loan association to a member thereof, provides that in consideration of a membership fee, the agreements and statements contained in his application for membership and full compliance with the terms, conditions and by-laws printed on the front and back of the certificate, the association would pay him, or his legal representatives, the sum of \$100 for each of the shares held by him at the end of seventy-eight months from the date of the certificate, the amount of the monthly installments to be paid upon each share and the actual date of the maturity of the certificate being fixed by an indorsement upon the back thereof, the holder of the certificate is entitled upon the maturity thereof, the required installments having been paid, to the maturity or par value of each share of stock held by him under such certificate.

2. SAME — TERMS AND CONDITIONS OF CONTRACT NOT INCONSISTENT WITH ABSOLUTE PROMISE TO PAY AMOUNT NAMED IN CERTIFICATE. Provisions in the terms, conditions, by-laws and articles of association printed upon the front and back of the certificate and made a part of the contract which provide that a shareholder should pay seventy-five cents a month on each share until the share *matures or is withdrawn*; that all shareholders should pay a monthly installment of seventy-five cents a share until the same shall be *fully paid*; that the amount to be paid to the owner of the shares at maturity shall be \$100 per share; that at stated periods the profits arising from interest, premiums, fines and other sources should be apportioned among the shares in good standing, and that no money should be drawn from the loan fund for any other purpose than the making of loans on security and to pay amounts due withdrawing shareholders, are not so inconsistent with the promise to pay the amount named in the certificate as to show an intention that such payment should

be made only in the event that, upon the shares held under such certificate, there has been paid a sum which, together with the profits apportioned thereto, would amount to its face value.

3. SAME—TERM "WITHDRAWING SHAREHOLDERS" DEFINED. The provision contained among those referred to and made a part of the contract, that no money may be drawn from the loan fund for any other purpose except making loans on security and to pay amounts due withdrawing shareholders, does not preclude the payment of the amount called for by the certificate, since the term "withdrawing shareholder" in that connection means not only shareholders who may withdraw before the maturity of their certificates, but also those who shall withdraw at that time or afterwards.

4. EVIDENCE—WHEN APPLICATION FOR MEMBERSHIP NOT A NECESSARY PART OF PLAINTIFF'S PROOF IN ACTION TO RECOVER UPON CERTIFICATE. In an action brought by a certificate holder against the association to recover the amount of the certificate, the failure of the plaintiff to introduce in evidence his application for membership in the association will not prevent a recovery, where it was not made a part of the contract, but preceded it, and was only mentioned as part of the consideration therefor, and, when the defendant makes no claim that it constituted a defense, the omission to introduce it cannot be regarded as a defect in proof.

5. ULTRA VIRES NOT AVAILABLE AS DEFENSE WHEN CERTIFICATE HOLDER HAS COMPLIED WITH CONTRACT IN GOOD FAITH. A defense in such an action, that the defendant was unauthorized by the statute under which it was organized to make such a contract, assuming that it was *ultra vires*, as to which no opinion is expressed, is not available where the contract has been in good faith fully performed by the plaintiff and the defendant has had the benefit of such performance and of the contract.

Vought v. Eastern Building & Loan Assn., 61 App. Div. 613, reversed.

(Argued November 24, 1902; decided December 2, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 9, 1901, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles S. Kent for appellant. The plaintiff made out a cause of action, and, upon the evidence, was entitled to judg-

ment. (*Matter of E. R. F. L. Assn.*, 131 N. Y. 370; *Plank Road Co. v. Payne*, 17 Barb. 580; *Barreda v. Silsbee*, 21 How. [U. S.] 146; *Williams v. Parker*, 136 Mass. 204; *N. Y. & N. H. Ry. Co. v. Schuyler*, 30 N. Y. 52.) The court erred in assuming that the questions of maturity, mutuality and *ultra vires* were questions of law. (*F. L. & T. Co. v. Curtis*, 7 N. Y. 466; *C. C. Bank v. Risley*, 19 N. Y. 369; *De Groff v. Thread Co.*, 21 N. Y. 124; *Howard v. Boorman*, 17 Wis. 459; *N. Y. F. O. Co. v. N. J. O. Co.*, 3 Duer, 648; *S. B. Co. v. Redsdale*, 36 N. J. L. 229; *Nelson v. Eaton*, 26 N. Y. 415; *Bank of U. S. v. Dandridge*, 12 Wheat. 79; *Kent v. Q. S. M. Co.*, 78 N. Y. 183; *Bennett v. Clough*, 1 B. & A. 461.) Plaintiff became a creditor of defendant at the end of seventy-eight months. (*Williams v. Parker*, 136 Mass. 204; *U. S. B. & L. Assn. v. Silverman*, 85 Penn. St. 97; *Christian's Appeal*, 102 Penn. St. 189; *Kunston v. N. B. & L. Assn.*, 67 Me. 201; *Kadish v. G. C. E. L. & B. Assn.*, 151 Ill. App. 531; *Everman v. Schmidt*, 53 Ohio St. 174; *House v. Eastern*, 52 App. Div. 163; *Allen v. Herrick*, 15 Gray, 284; *A. T. Works v. Boston*, 139 Mass. 9.) The promise to pay is not *ultra vires*. (*Nelson v. Eaton*, 26 N. Y. 215.) The promise to pay was absolute and within the terms of the statute. There are no exceptions in the statute enabling avoidance of a promise. (*Head v. Co.*, 2 Cranch, 167; *Rhodes v. Assn.*, 82 Penn. St. 183; *Heck v. McEwen*, 12 Lea, 97; *Lovett v. Assn.*, 6 Paige, 56; *President, etc., v. Ry. Co.*, 7 Lans. 245; *Whitney v. U. T. Co.*, 65 N. Y. 577; *Buffalo v. Cary*, 26 N. Y. 80; *People v. Preston*, 140 N. Y. 552; *Bank of Pennsylvania v. Comm.*, 19 Penn. St. 152; *A. T. Works v. Boston*, 139 Mass. 9.) The contract to pay at a definite time could be made by the defendant under the statute. There is no express engagement of plaintiff to pay installments after the seventy-eight months. (*Angell & Ames on Corp.* 493; *C. R. Bridge v. Warren*, 11 Pet. 420; *A. T. Co. v. Boston*, 139 Mass. 9; *Williams v. Parker*, 136 Mass. 204; *Avery v. Herrick*, 15 Gray, 280; *Bank v. Earll*, 13 Pet. 595; *Matter of E. R. F. L. Assn.*,

N. Y. Rep.] Opinion of the Court, per MARTIN, J.

131 N. Y. 369; *Kadish v. Assn.*, 151 Ill. 537; *Ward v. Johnson*, 95 Ill. 240; *Ry. Co. v. McCarthy*, 96 U. S. 267; *San Antonio v. Chaffee*, 96 U. S. 315.)

Daniel A. Pierce for respondent. The plaintiff failed to make out a *prima facie* case. (Thompson on Building Assns. [2d ed.], §§ 3, 4; *Silver v. Barnes*, 6 Bing. [N. C.] 180; *Robertson v. H. Assn.*, 10 Md. 397; *Tilley v. A. B. & L. Assn.*, 52 Fed. Rep. 618; *Nat. S. & L. Bank v. M. Nat. Bank*, 89 N. Y. 467, 469; *Jemison v. C. S. Bank*, 122 N. Y. 135; *People ex rel. v. Campbell*, 144 N. Y. 166, 172; Endlich on Building Assns. [2d ed.] §§ 42, 218; Thompson on Building Assns. [1st ed.] 15; Cook on Stockholders [3d ed.], § 492; *Gibbs v. L. I. Park*, 83 Hun, 92; *Matters of Comrs. of Washington Park*, 52 N. Y. 131; *Engelhardt v. F. W. Assn.*, 148 N. Y. 281; *Burr v. Wilcox*, 22 N. Y. 551.) The appellant failed to prove her contract. (*Matter of Washington Park*, 52 N. Y. 131; *Seward v. Huntington*, 94 N. Y. 104.) None of the appellant's exceptions are well founded. (*Kennedy v. Porter*, 109 N. Y. 526; *A. F. Ins. Co. v. Austin*, 69 N. Y. 470; *Dwight v. G. Ins. Co.*, 103 N. Y. 341; *Brady v. Cassidy* 104 N. Y. 147.)

MARTIN, J. This action was to recover one thousand dollars, the par or maturity value of ten shares of stock issued by the defendant, five shares to the plaintiff and five shares that were assigned to her which were originally issued to one H. E. Newton. The contract or certificates of shares made and issued by the defendant to the plaintiff and her assignor constituted them shareholders, and provided that in consideration of the membership fee of one dollar upon each share, together with the agreements and statements contained in the application for membership in the association, and full compliance with the terms, conditions and by-laws printed on the front and back of each certificate, the defendant would pay to such shareholder, or his or her executors, administrators, or assigns, the sum of one hundred dollars for each of said shares at the end of seventy-eight months from the date thereof.

Indorsed upon each of these certificates was the name of the shareholder, his residence, and a statement that the monthly installments were three dollars and seventy-five cents. Indorsed upon the certificate issued to the plaintiff was, "Date of issue Dec. 1st, 1891. Maturity, June 1st, 1898," while upon the certificate originally issued to Newton and transferred to the plaintiff was indorsed, "Date of issue Oct. 1, 1890. Maturity, April 1, 1897." The terms and conditions referred to provided, in considerable detail, for the withdrawal of shares by a shareholder before the period of maturity, the time and method of such withdrawal, and the terms upon which it might be made.

As the defendant is a going association, and the questions here presented do not arise upon its insolvency or dissolution, it is perhaps doubtful if the articles of association are to be regarded as a part of the contract between the parties. Yet, in the consideration of this case, we shall treat them as material in determining the character and effect of the agreement and the rights of the parties under it. The certificates issued provide that the terms, conditions and by-laws printed on the front and back thereof are made a part of the contract, and, hence, taken together, they constitute the agreement between the parties and the standard by which their rights and liabilities are to be determined. (*People ex rel. Atty.-Gen. v. Life & R. Assn.*, 150 N. Y. 94, 108; *Matter of Equitable R. F. L. Assn.*, 131 N. Y. 354, 369.)

At the threshold of this investigation we find an absolute and unqualified promise upon the part of the defendant to pay to each of the holders of the stock owned by the plaintiff the sum of one hundred dollars for each share at the end of seventy-eight months from the date of the certificate, and also an indorsement thereon of the actual time when the shares were to mature. Therefore, as that time had expired and the required payments had been made, it is manifest that the plaintiff was entitled to recover, unless there is some other part of the contract which modifies or changes that provision.

It is contended by the respondent that such a change is

N. Y. Rep.] Opinion of the Court, per MARTIN, J.

wrought by the other provisions contained in the terms, conditions, by-laws and articles of association, and that this agreement to pay at the expiration of seventy-eight months must, in the light of such provisions, be read and construed as an estimated, and not an actual, time of payment. Its contention is that the provisions of paragraph one of the terms and conditions printed upon the certificate, which provide that the shareholder shall pay seventy-five cents a month on each share until the share *matures or is withdrawn*; section 14 of article 14 of the by-laws, stating that all shareholders shall pay a monthly installment of seventy-five cents on each share, until the same shall be *fully paid*; the fifteenth paragraph of the articles of association, which declares that the amount to be paid to the owners of shares at maturity shall be one hundred dollars per share; the sixth paragraph of the terms and conditions, which provides that at stated periods the profits arising from interest, premiums, fines and other sources shall be apportioned among the shares in good standing, and article eleven of the by-laws, which declares that no money can be drawn from the loan fund for any other purpose than the making of loans on security and to pay amounts due withdrawing shareholders, when given their obvious meaning, effect an utter alteration of the provision by which the defendant agreed to pay the plaintiff one hundred dollars upon each share at the expiration of the term actually designated. If such change or modification is wrought it can only be upon the ground that the provisions of the contract relied upon by the defendant are inconsistent with its promise to pay at the time named and clearly show that the intention of the parties was that such payment should be made only in the event that upon the shares owned by the plaintiff there had been paid a sum which, together with the profits apportioned to them, would amount to the face of the shares. In other words, the defendant's contention is that those provisions were sufficient to change an absolute promise to pay into a conditional one dependent upon the success of its enterprise. We find nothing in these provisions which would

justify any such conclusion. The provision in paragraph one that the plaintiff should pay until the share is paid or withdrawn, is entirely consistent with the agreement for absolute payment for the shares by the defendant at the time named, as by its contract it agreed that the plaintiff's shares should mature at that time. The provision of section 14, article 14, of the by-laws obviously refers to the agreement in the certificate by which such payments were to be continued for seventy-eight months, and when payments had been made for that period clearly the shares became fully paid. The same may be said as to the fifteenth paragraph of the articles of association, which declares that the amount to be paid to the owners of the shares at maturity shall be one hundred dollars per share. Where shares are to be paid for by paying the sum of seventy-five cents monthly upon each for the period of seventy-eight months, and such payments have been made, it is extremely difficult to discover any theory upon which it can be properly held that such shares have not been fully paid and matured. Nor do we see how the provision for apportioning profits among the shares in any way relieved the defendant from or modified its promise to pay at the time named.

But it is further contended by the respondent that inasmuch as it is provided by article eleven of the by-laws that no money can be drawn from the loan fund for any other purpose except making loans on security and to pay amounts due withdrawing shareholders, the defendant had no authority to pay this claim because the loan fund was the only one from which such payments could be made. If that be true, and the plaintiff is not to be regarded as a withdrawing shareholder, we are unable to see how it could pay the plaintiff's claim even if she had already paid more than the face thereof, as all the receipts of the association are divided into two classes, the loan fund and the expense fund. The latter is dedicated to, and employed in, paying the current expenses of the association, and the loan fund contains all the money received which does not go into the expense fund as therein provided. Hence, there never could be any fund from which such certificates could be paid, if

N. Y. Rep.] Opinion of the Court, per MARTIN, J.

the contention of the respondent is correct. We think it is not. We are of the opinion that the term "withdrawing shareholders" in that connection means not only shareholders who may withdraw before the maturity of their certificates, but also those who shall withdraw at that time or afterwards. Any other construction would result only in absurdity, and any interpretation which would produce such a result should, if possible, be avoided. Moreover, if the provisions relied upon to modify or change the absolute promise of the defendant to pay at the expiration of seventy-eight months, are at all inconsistent with that provision, still the promise ought not to be changed or modified by any provision of the contract which is less definite and certain than the promise itself. As the contract was prepared by the defendant, if there is any uncertainty or ambiguity as to its meaning, it should be resolved in favor of the plaintiff. The defendant is responsible for it, as the language is wholly its own. (*Gillet v. Bank of America*, 160 N. Y. 549, 554.)

It is also pertinent to inquire what object the plaintiff or her assignor could possibly have had in purchasing stock, if she or he was to pay the full amount in cash, and then at the end of eleven years receive without interest only the principal which had been thus paid. Obviously the inducement to make such purchase was that the plaintiff and her assignor were to obtain a profit by thus investing their money, as one of the avowed objects of the association was to afford its members a safe and profitable investment of their savings. When we look at the terms, conditions, by-laws and articles of association we find, among other things, that a withdrawing member is to receive six per cent upon his investment after six months and up to two years, the third year seven per cent, and after that until maturity eight per cent, and that the association may also mature any certificate after one year and issue a paid-up certificate payable at maturity, with interest at six per cent. It may also cancel any unpledged certificate, by lot, upon the payment to the owner of the amount of the installments paid thereon, together with eight

per cent per annum as added dividend. Again, it may issue paid-up stock at the price of fifty dollars per share, payable on the date of issue, in which case, after the expiration of the time when it is to mature, the party will receive the sum of one hundred dollars. Thus, if the defendant's contention is correct, the member who withdraws before the maturity of his certificate, or whose certificate is matured by the defendant or canceled by it, or the member who purchases paid-up stock, will receive for the amount paid a much greater proportion than the shareholder who continues to the end and pays the full amount required by his certificate. These and other provisions of the contract show quite conclusively that it was not the intent of the agreement that the purchaser of shares, who paid for them in full, should receive only the amount paid by him, without interest, but that its purpose was that the investment should be a profitable one, and in furtherance of that purpose it was that this contract was made. This, like other contracts, should be so interpreted as to carry into effect the intent and purpose of the parties in making it. Can any one suppose for a moment that the plaintiff or her assignor, when she or he purchased this stock, with an agreement that it should mature at the end of seventy-eight months, even suspected that such maturity was to depend upon other conditions or circumstances than the expiration of the time? Obviously not. This contract must be interpreted as an agreement upon the part of the defendant to pay to the plaintiff and her assignor the amount of one hundred dollars upon each of the shares represented by the two certificates in suit at the expiration of seventy-eight months from their date and at the time indorsed upon the back thereof.

It was admitted by the pleadings, if not upon the trial, that prior to the commencement of the action the plaintiff made her proof of claim against the defendant, as required by the terms of the certificates, and that the same was rejected by it. Therefore, the plaintiff was entitled to recover the amount of the certificates in suit.

The contention of the respondent that the plaintiff should

N. Y. Rep.] Opinion of the Court, per MARTIN, J.

not recover for the reason that the application was not introduced in evidence, cannot be upheld. While the certificate recites that "in consideration of the membership fee, together with agreements and statements contained in the application for membership in the Association, and full compliance with the Terms, Conditions and By-laws printed on the front and back of this certificate, which are hereby referred to and made a part of this contract," it promised to pay as therein provided, still it is obvious that the application for membership was not in fact made a part of the contract, but preceded it and was only mentioned as a part of the consideration therefor. If there was in the application any statement or representation which might have formed a basis of defense, it should have been pleaded and proved by the defendant, and as there was no claim that the application constituted a defense the omission of the plaintiff to introduce it in evidence cannot be regarded as a defect of proof upon her part.

The only remaining question we deem it necessary to consider arises upon the contention of the defendant that it was unauthorized by the statute under which it was organized to make the contract in suit, and, hence, the plaintiff cannot recover. The defendant was organized under the provisions of chapter 122 of the Laws of 1851 and the statutes amendatory thereof and supplemental thereto. We deem it unnecessary at this time to determine whether the defendant was authorized by that statute to enter into such contracts, for if we assume that the making of them was in excess of the express power conferred upon the corporation by that statute, still, as the contracts involved no moral turpitude and did not offend any express statute, they were not illegal in a sense that would prevent the maintenance of an action thereon. It is now well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been, in good faith, fully performed by the other party, and the corporation has had the benefit of the performance and of the contract. As has been said, corporations, like natural persons, have power and capacity to do wrong. They may, in their con-

tracts and dealings, break over the restraints imposed upon them by their charters; and when they do so their exemption from liability cannot be claimed on the mere ground that they have no attributes nor facilities which render it possible for them thus to act. While they have no right to violate their charters, yet they have capacity to do so, and are bound by their acts where a repudiation of them would result in manifest wrong to innocent parties, and especially where the offender alleges its own wrong to avoid a just responsibility. It may be that while a contract remains unexecuted upon both sides, a corporation is not estopped to say in its defense that it had not the power to make the contract sought to be enforced, yet when it becomes executed by the other party, it is estopped from asserting its own wrong and cannot be excused from payment upon the plea that the contract was beyond its power. (*Bissell v. Mich. So. & No. Ind. R. R. Cos.*, 22 N. Y. 258; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Rider Life Raft Co. v. Roach*, 97 N. Y. 378; *Holmes, Booth & Haydens v. Willard*, 125 N. Y. 75, 80; *City of Buffalo v. Balcom*, 134 N. Y. 532; *Bath Gas L. Co. v. Claffy*, 151 N. Y. 24; *Moss v. Cohen*, 158 N. Y. 240, 249; *Hannon v. Siegel-Cooper Co.*, 167 N. Y. 244.)

Our attention has been called to several cases in the Supreme Court where a doctrine adverse to this decision has been held, but after a full consideration of those decisions, we have reached the conclusion that they should not be followed.

It is contended that if the construction we have given this contract is to prevail, it will affect the responsibility of the defendant, if it does not result in its bankruptcy. If that be true, yet it affords no proper reason why we should disregard the plain and unqualified terms and provisions of the contract. Nor does it furnish any excuse for us to disregard well-established principles of law to hold it unenforceable. If it be true that the defendant cannot successfully continue its business upon the plan it has established without disregarding its contracts, or without making false or unauthorized promises to its stockholders to induce the unwary to pay their money

N. Y. Rep.]

Statement of case.

to it upon contracts it does not intend to or cannot perform, no unmitigated calamity will be liable to befall the community in which its business is transacted by its suspension or by a final dissolution of the association. It is better that it should fail than that it should continue to hold out false hopes to investors who may not only be deprived of their promised profits, but may ultimately lose the principal as well.

By these considerations we are led to the conclusion that the certificates upon which this action was brought had matured when it was commenced; that there was due the plaintiff thereon the sum of one thousand dollars and interest after sixty days from the presentation and rejection of the claims made under them; that the trial court improperly nonsuited the plaintiff, and that the judgments of the courts below should be reversed.

The judgments of the Trial Term and of the Appellate Division should be reversed and a new trial granted, with costs to abide the event.

PARKER, Ch. J., GRAY, O'BRIEN, VANN, CULLEN and WERNER, JJ., concur.

Judgments reversed, etc.

FREDERIC W. RHINELANDER, Appellant, v. THE FARMERS' LOAN AND TRUST COMPANY, Respondent.

BENJAMIN W. FLEISHER, Appellant, v. THE FARMERS' LOAN AND TRUST COMPANY, Respondent.

1. RAILROAD MORTGAGE — LIABILITY OF TRUSTEE TO BONDHOLDERS FOR FAILURE TO COMPLY WITH PROVISIONS OF MORTGAGE — ACTION AGAINST TRUSTEE, NOT WITHIN TWENTY YEARS' STATUTE OF LIMITATIONS. Where a railroad company executed a mortgage, under seal, upon property to be thereafter acquired and constructed, to a trust company as trustee for the holders of the bonds secured by such mortgage, which provided that the bonds should be deposited with the trustee to be certified and issued from time to time at the request of the company, or its president, in writing, the net proceeds thereof to remain in the hands of the trustee to be paid out only for the purpose of acquiring property and constructing and equipping the railroad, and to be "paid out only on the

written order or request of the executive committee of the board of directors of the company, or a majority of said committee, in which order or request the president, or acting president, of the company shall in all cases join, and all such orders and requests shall include a written statement, or memorandum, declaring the purpose, or purposes, for which the proceeds of said bonds so ordered to be paid over are to be appropriated or used," and also provided, in substance, that the company might apply any of the said bonds for the purposes of its incorporation without converting the same into money, and in that case it should furnish a similar statement or memorandum declaring the purpose, or purposes, for which the bonds were to be used, but no positive covenant was made by the trustee to carry out such provisions, an implied covenant to that effect cannot be read into the mortgage upon which an action upon a sealed instrument can be commenced, within twenty years from the execution of the mortgage, against the trustee for its failure to comply with such provisions.

2. SAME — ACTION AGAINST TRUSTEE FOR BREACH OF IMPLIED LEGAL DUTIES OR OBLIGATIONS, MUST BE COMMENCED WITHIN TEN YEARS FROM TIME OF BREACH OF TRUST. The failure of the trustee to carry out such provisions of the mortgage and protect the interests of the bondholders by refusing to issue bonds and pay out the proceeds thereof until assets available to support the mortgage security should be acquired by the railroad company, unless ordered to do so by the court, constitutes, however, a breach of an implied legal duty or obligation springing from the relation of trustee and *cestui que trust*, upon which an action against the trustee can be maintained by aggrieved bondholders, but such action falls within the provisions of section 388 of the Code of Civil Procedure and must be commenced within ten years from the time of the last delivery of the bonds by the trustee to the railroad company.

Rhineland v. Farmers' Loan & Trust Co., 58 App. Div. 619, affirmed.

Fleisher v. Farmers' Loan & Trust Co., 58 App. Div. 473, affirmed.

(Argued June 23, 1902; decided December 9, 1902.)

APPEALS from two orders of the Appellate Division of the Supreme Court in the first judicial department, entered April 12, 1901, which affirmed two judgments entered upon a decision of the court on trial at Special Term sustaining demurrers of defendant to the replies of the plaintiff and dismissing the complaint.

The nature of the actions and the facts, so far as material, are stated in the opinion.

Silas W. Pettit, Thomas N. Rhineland and *Francis C. Huntington* for appellant in both cases. The complaint states

facts sufficient to constitute a cause of action. (*Belden v. Burke*, 72 Hun, 51; *Frishmuth v. F. L. & T. Co.*, 95 Fed. Rep. 9; *Tuttle v. Gilmore*, 36 N. J. Eq. 617.) When the so-called "Land Grant" bonds were issued there was no land grant. (*Bank v. Byers*, 41 S. W. Rep. 325; *Nash v. Minn. Trust Co.*, 159 Mass. 437; *Stevenson v. Marble*, 84 Fed. Rep. 23; *Miles v. Roberts*, 76 Fed. Rep. 919; *Miles v. Vivian*, 79 Fed. Rep. 848; *D. R. Co. v. U. S. T. Co.*, 41 Fed. Rep. 720.) The defendant issued and delivered the bonds without the statement required by the mortgage. (*Schoellkopf v. Coatsworth*, 166 N. Y. 77; *Gillet v. Bank of America*, 160 N. Y. 549; *Russell v. Allerton*, 108 N. Y. 288; *Wright v. Reusens*, 133 N. Y. 298; *Jugla v. Trouttet*, 120 N. Y. 21; *Wilmerding v. McKisson*, 103 N. Y. 329; *N. Assn. v. Smith*, 85 Fed. Rep. 401; *Prentice v. F. Co.*, 58 Fed. Rep. 437; *Accumulator Co. v. Dubuque Co.*, 64 Fed. Rep. 70; *Westervelt v. Mohrenstecker*, 76 Fed. Rep. 118.) The duty as between the trustee and the *cestui que trust* is expressed in the mortgage. (*W. Assn. v. Smith*, 85 Fed. Rep. 401; *Hendrick v. Lindsay*, 93 U. S. 143; *Sturgis v. Knapp*, 31 Vt. 1; *Clark v. Howard*, 74 Hun, 230; *Hollister v. Stewart*, 111 N. Y. 644; *H. C. Co. v. P. C. Co.*, 8 Wall. 276; *Frey v. Johnson*, 22 How. Pr. 316; *Booth v. C. M. Co.*, 74 N. Y. 15; *Jones v. Kent*, 80 N. Y. 585; *Mansfield v. N. Y. C. & H. R. R. R. Co.*, 102 N. Y. 205.) The plaintiff can sue on the mortgage. (*Lechmere v. Carlisle*, 3 P. Wms. 211; *Osgood v. Strode*, 2 P. Wms. 245; *Stephens v. Freeman*, 1 Ves. Sr. 73; *Oldham v. Litchfield*, 2 Vern. 506; *Gale v. Gale*, 6 Ch. Div. 144-148; *Vandyne v. Vreeland*, 3 Stock. 370; *Finley v. Simpson*, 22 N. J. L. 311; *Putton v. Heustis*, 2 Dutch. 293; *Harrison v. Vreeland*, 9 Vroom, 366; *Atl. Dock Co. v. Davitt*, 54 N. Y. 35; *Bowen v. Beck*, 94 N. Y. 86-89.) The limitation is twenty years. (Code Civ. Pro. §§ 380, 381; 2 R. S. 301, § 48; *Dwinelle v. Edey*, 102 N. Y. 423; *Van Schaick v. T. A. R. R. Co.*, 38 N. Y. 346; *Coster v. Mayor, etc.*, 43 N. Y. 339; *Miller v. Parkhurst*, 9 N. Y. S. R. 759; *Bowen v. Beck*, 91 N. Y. 86; *N. Y. L.*

Ins. Co. v. Aitken, 125 N. Y. 660; *Marr v. Cheston*, 1 Swanst. 416; *Masters v. Stratton*, 7 Hill, 101; *Wilbur v. Brown*, 3 Den. 356.)

John E. Parsons and *David McClure* for respondent in both cases. The complaint does not state a cause of action. (*People v. Suprs. of Orange County*, 17 N. Y. 235; *People v. H. Ins. Co.*, 92 N. Y. 328; *D. Ry. Co. v. U. S. T. Co.*, 40 Fed. Rep. 720; *Hollister v. Stewart*, 111 N. Y. 644.) These actions are not brought upon a sealed instrument, and the twenty years' Statute of Limitations does not apply. (*Fogg v. Blair*, 139 U. S. 118; *Ambler v. Choteau*, 107 U. S. 586; *Kent v. S. C. Co.*, 144 U. S. 75, 91; *Van Weel v. Winston*, 115 U. S. 228; *Chicot Co. v. Sherwood*, 148 U. S. 529; *Bogardus v. N. Y. L. Ins. Co.*, 101 N. Y. 328; *Black v. H. Ins. Co.*, 47 Hun, 210; *Stoddard v. Treadwell*, 26 Cal. 294; *U. S. v. Ames*, 99 U. S. 35; *B. C. Inst. v. Bitter*, 87 N. Y. 250.)

BARTLETT, J. The actions are brought by bondholders as the *cestui que trust* in a railroad mortgage against the defendant as the trustee therein, to hold the defendant liable for its affirmative act of certifying, issuing and delivering bonds, to be sold to the plaintiffs, or whoever might become the purchaser thereof, as first mortgage land grant bonds, secured by mortgage on the land grant described therein, contrary to and in violation of the covenants of the mortgage.

The plaintiff Rhinelanders is the holder of twenty bonds of the Oregon Pacific Railroad Company, purchased in the year 1887, and the plaintiff Fleisher is the holder of five bonds purchased in the year 1889.

Two questions are presented on this appeal: (1) Do the complaints set forth a cause of action? (2) Are these actions brought upon a sealed instrument and barred only by the twenty years' Statute of Limitations; or upon an implied covenant or obligation springing from a breach of duty on the part of the trustee, not found in specific terms in the mortgage, and barred by the ten years' Statute of Limitations?

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

On the first day of October, 1880, the Oregon Pacific Railroad Company executed its first mortgage, land grant, sinking fund, gold bonds for \$15,000,000, par value, being 15,000 bonds of \$1,000 each, due October 1st, 1900, the payment of which was secured by a mortgage executed by said Oregon Pacific Railroad Company, as party of the first part, the defendant, the Farmers' Loan and Trust Company, as party of the second part, and the Willamette Valley and Coast Railroad Company, as party of the third part. The bonds state upon their face that they are "limited in issue to \$25,000 per mile of the said railroad;" they also state that they are secured by a mortgage or deed of trust, signed by the Oregon Pacific Railroad Company jointly with the Willamette Valley and Coast Railroad Company to the Farmers' Loan and Trust Company as trustee for the holders of the said bonds, conveying the property and franchises of the said two railroad companies, including land grants and all other real estate owned or to be owned by them.

The complaint alleges, among other things, that the Oregon Pacific Railroad Company was incorporated under the laws of the state of Oregon about September 14th, 1880, with authority to construct and operate a line of railroad from Yaquina Bay, Benton county, Oregon, to Boise City in the state of Idaho; and to construct and operate the line of railroad of the Willamette Valley and Coast Railroad Company; also to issue the bonds secured by the mortgage, to which reference has already been made.

It is further alleged that the Willamette Valley and Coast Railroad Company was incorporated under the laws of the state of Oregon in July, 1874, with authority to construct and operate a line of railroad from Corvallis in Benton county, Oregon, to the tide water on Yaquina Bay in the same county and state; and by acts of the legislature of the state of Oregon there was granted to said railroad company all the tide and marsh lands situate in said county of Benton; and the right to take from the lands of the state adjacent to the line of said road, timber, stone, water and other materials necessary

to its construction, with other rights that need not be specifically stated; that the Willamette Valley and Coast Railroad Company, at the time its franchise and property were conveyed to the Oregon Pacific Railroad Company, possessed the right to become the owner by payment of six hundred thousand dollars, of all the shares of the capital stock of the Willamette Valley and Cascade Mountain Wagon Road Company, an Oregon corporation; and also the grant of land known in this case as the land grant of the said wagon road company, amounting to 850,000 acres, the same being a right of selection from twice that number of acres of land located within the limit of six miles on either side of the route of the said wagon road company, which stocks and lands were subject, before the title thereto could be acquired by the said the Willamette Valley and Coast Railroad Company, to the payment of said sum of six hundred thousand dollars.

The questions presented by this litigation involve the construction of the fourth and fifth subdivisions of the mortgage, which read as follows:

"*Fourth.* That the party of the first part shall and will, and it hereby covenants and agrees to apply the net proceeds arising from the sale of the bonds secured by this indenture, in the first place to the liquidation and discharge of the herein-mentioned incumbrance, amounting to six hundred thousand dollars or thereabouts, now existing upon the land grant known as the grant of the Willamette Valley and Cascade Mountain Wagon Road Company, and subsequently to the building, grading and otherwise constructing the line of the said railroad, as the same may have been or may be surveyed and laid out, and for the full and complete furnishing and equipping of the said railroad, and the purchasing and procuring of locomotives, engines, cars and other proper equipment, and rolling stock, and other proper and suitable appurtenances for the said railroad, and for erection of depots, station houses, and such other buildings as may be suitable and proper for the same, and also for the purchasing, furnishing, equipping and operating of such steamships,

steamers, barges, ferryboats and other water craft as may be suitable and proper for the carrying out of the purposes for which the party of the first part was incorporated, or any of them, and also for such other and further purposes as may enable the party of the first part to engage in the other enterprises and purposes for which it has been so incorporated, and further, that the proceeds of the first issue of the said bonds to the extent of three million two hundred and fifty thousand dollars of principal shall be applied in the first place to the satisfaction of the said incumbrance, and to the building, constructing and equipping of the first one hundred and thirty miles of the said railroad from the ocean eastward in case of surplus to the acquiring of necessary water craft.

"Fifth. That the party of the first part shall and will, and it hereby covenants and agrees, after the said bonds shall have been duly executed by and on behalf of the party of the first part, to deposit the same with the party of the second part, to be certified and issued from time to time as the same may be sold or otherwise disposed of, and the said trustees may certify and issue any of said bonds at any time on the request of the party of the first part, or of its president, in writing, and the net proceeds which may be realized on the sale of the said bonds shall be paid over to and remain in the hands of the said trustee for the purposes above enumerated, and shall be paid out only on the written order or request of the executive committee of the board of directors of the party of the first part or of a majority of the said committee, in which order or request the president or acting president of the party of the first part shall in all cases join, and all such orders and requests shall include a written statement or memorandum declaring the purpose or purposes for which the proceeds of the said bonds so ordered to be paid over are to be appropriated or used; provided, however, that in case the party of the first part shall desire to apply any of the said bonds for the purposes of its incorporation, without converting the same into money, then and in that case it shall furnish the said trustee with a like written order or request of the said execu-

tive committee, or of a majority thereof, in which the said president or acting president shall join, which shall include a written statement or memorandum declaring the purpose or purposes for which the said bonds are to be appropriated or used, and in such case the said trustee shall certify, issue and deliver the said bonds. It shall be the duty of the president and secretary of the party of the first part to furnish the said trustee with a written certificate, under the seal of the said corporation, of the names and residences of the persons constituting such executive committee, which certificate shall be conclusive evidence for the said trustee of the fact that the persons so named constitute and compose such executive committee until it shall be notified in like manner of the appointment of other persons in their room and stead. Nothing herein contained shall be so construed as requiring the said trustee to inquire into the application of the funds or of the bonds which it may deliver over on the receipt of such orders or requests as aforesaid."

We come then to the consideration of the controlling question, whether the complaints state a cause of action, and, if so, whether the action is brought upon the mortgage as a sealed instrument, or for a breach of the implied duty or obligation springing from the relation of trustee and *cestui que trust*.

A careful study of the provisions of the mortgage satisfies us that the defendant is in breach of no affirmative covenant made by it and contained therein. The covenants recited in the fourth and fifth subdivisions of the mortgage are those of the Oregon Pacific Railroad Company as mortgagor.

In brief, the mortgage contains, among other things, the usual recitals of fact, the covenants of the mortgagor, the ordinary provisions for foreclosure in case of default in the payment of interest on the bonds, the provision covering a case of vacancy in the office of trustee, and a clause limiting the liability of the trustee and providing for the repayment of its necessary disbursements. Then follows the witnessing clause, which, among other statements, contains these words, "and the said Farmers' Loan and Trust Company, party of the

second part, for the purpose of signifying the acceptance of the trust herein and hereby created, hath caused these presents to be subscribed by its president, and attested by its secretary, and hath caused its corporate seal to be hereto affixed."

We thus have the case of the ordinary railroad mortgage, in which the trustee enters into no positive covenants, but accepts the trust which provides in express terms the duties of the trustee in the event of default in the payment of interest and resulting foreclosure and sale. There is no complaint made as to the manner in which the trustee performed these duties.

In order to determine the precise nature of the liability of the trustee, sought to be enforced by the plaintiff, it becomes necessary to consider the provisions in detail contained in the fourth and fifth subdivisions of the mortgage already quoted in full. In the fourth subdivision the Oregon Pacific Railroad Company covenants to apply the net proceeds of the sale of the bonds, *first* to the discharge of the incumbrance of six hundred thousand dollars existing upon the land grant of the Willamette Valley and Cascade Mountain Wagon Road Company; *second*, in brief, for the purposes of its incorporation generally; *third*, to enable it to engage in the other enterprises for which it was incorporated.

In the fifth subdivision the Oregon Pacific Railroad Company covenants that after the bonds are executed it will deposit them with the trustee to be certified and issued from time to time at the request of the company, or its president, in writing, the net proceeds to remain in the hands of the trustee, *for the purposes above enumerated*. (These purposes are those already pointed out as contained in the fourth subdivision.) It is further provided that these proceeds are to be "paid out only on the written order or request of the executive committee of the board of directors of the party of the first part, or of a majority of said committee, in which order or request the president, or acting president, of the party of the first part shall in all cases join, *and all such orders and requests shall include a written statement, or memorandum,*

declaring the purpose, or purposes, for which the proceeds of said bonds so ordered to be paid over are to be appropriated or used."

It is further provided in this subdivision, in substance, that the party of the first part may apply any of the said bonds for the purposes of its incorporation without converting the same into money, and in that case it shall furnish a similar statement or memorandum declaring the purpose, or purposes, for which the bonds are to be used.

The complaint alleges in this connection, in substance, that the trustee has not kept its covenant and agreement in this behalf; that it had in its possession the entire issue of 15,000 bonds, and delivered to the Oregon Pacific Railroad Company May 31st, 1881, 3,250 of said bonds without receiving a statement of the purposes for which said bonds were to be appropriated as required by the mortgage. That the statement actually received reads as follows: "That the purposes for which said bonds are to be appropriated or used are the purchase of necessary materials, the construction of its lines and the discharge of its obligations, and for other purposes of the organization."

The complaint then alleges: "And this although at that time whatever right the said Willamette Valley and Coast Railroad Company ever had to acquire said lands as specified and conveyed in and by said mortgage had expired; *all which was well known to said defendant.*"

For the purposes of this appeal the facts alleged in the complaint must be taken as true.

The charge of the complaint is that the trustee violated *its covenant and agreement* by delivering to the railroad company these 3,250 bonds without exacting a statement showing that the latter proposed to devote this first issue to the discharge of the incumbrance of six hundred thousand dollars existing upon the land grant of the wagon road company, as specifically required by the mortgage, with full knowledge that the time to acquire the land grant of about 850,000 acres of land had been allowed to expire.

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

The complaint also alleges that the trustee on or about December 11th, 1884, delivered to the railroad company on a like general statement and with full knowledge that the said one hundred and thirty miles of railroad had not been built and equipped, one thousand more of said bonds; that on February 17th, 1885, under like circumstances, 3,750 bonds were delivered, and in June, 1885, the balance of 7,000 bonds were delivered under the same conditions.

The allegation of the complaint that the trustee has not kept and performed its covenant and agreement in this behalf must necessarily refer to an implied covenant and agreement, as the mortgage contains no positive covenant that the trustee will exact from the railroad company such a statement as is described in the mortgage.

The defendant points out in this connection that the fifth subdivision of the mortgage provides that "Nothing herein contained shall be so construed as requiring the said trustee to inquire into the application of the funds, or of the bonds, which it may deliver over on receipt of such orders or requests as aforesaid." This suggestion is aside from the question; the claim of the plaintiffs is that the trustee rested under the obligation, in the first instance, of exacting from the railroad company a statement showing the purposes for which each issue of bonds was to be used. If this be so, the provision of the mortgage exempting the trustee from inquiring into the application of the funds or the bonds "delivered over on the receipt of such orders, or requests," does not apply, as the point made refers solely to the right of the trustee to issue the bonds.

At the time the first 3,250 bonds were issued, May 1st, 1881, it is clear that the trustee failed in the discharge of its implied duty or obligation by not requiring a specific statement as to the purposes for which they were to be used, and seeking the instruction of the court, for its own protection, under circumstances which indicated a serious impairment, at the outset, of the mortgage security.

It is apparent that at this time no portion of the contem-

plated railroad had been constructed, and that the only assets on which the mortgage lien could presently operate were the franchises and land grant of the Willamette Railroad Company, and the right of that company, by payment of six hundred thousand dollars, to become the owner of the 850,000 acres of land included in the grant of the wagon road company.

It would seem too clear for argument that the trustee rested under the implied duty to the future bondholders to see that the only assets then available to feed the security should be acquired by the railroad company, or, failing in that, to refuse issuing bonds unless ordered to do so by the court.

It also appears in the admitted facts of the case that the bonds, or the proceeds of the bonds, were to be advanced to the railroad company only at the rate of \$25,000 per mile, and that the first issue of 3,250 bonds was to be devoted, primarily, to the payment of the six hundred thousand dollars for the land grant of the wagon road company and the construction of the first one hundred and thirty miles of the railroad from the ocean eastward. Not only was this first advance of bonds made upon an insufficient statement, but between May 1st, 1881, and June, 1885, the remainder of the 15,000 bonds was issued in three additional lots by the trustee to the railroad company on similar statements and with full knowledge that the one hundred and thirty miles of railroad from the ocean eastward had not been completed, nor had \$25,000 a mile been expended on such portion as was built. In fact, the provisions of the fourth and fifth subdivisions of the mortgage, imposing upon the trustee the implied obligation to issue or pay out the bonds, or their proceeds, to the railroad company upon statements which were to disclose the manner in which they were to be used, were utterly ignored, and the bonds issued without regard to the land grant of the wagon road company, or the mileage of the constructed railroad.

The subsequent history of this enterprise shows how dis-

astrous this action of the trustee was to bondholders. The Oregon Pacific Railroad Company made default in the payment of its coupons October 1st, 1890; the trustee began an action to foreclose the mortgage and the president of the railroad company was appointed receiver; thereafter receiver's certificates to the amount of eight hundred and fifty thousand dollars were issued; on December 22d, 1894, the mortgaged premises were sold under a decree of foreclosure and were purchased for the sum of one hundred thousand dollars; a deed was executed to the purchaser, conveying all the property upon which the mortgage was a lien; this purchase was solely in the interest of the purchaser, and the rights of bondholders and stockholders were extinguished.

The meagre and paltry assets of this railroad company, as disclosed by the admitted facts, is a striking illustration of how bonds of the par value of fifteen million dollars can be marketed upon security utterly inadequate.

It was to prevent bondholders from drifting into such a situation that the railroad company covenanted to furnish the trustee, when calling for bonds, or their proceeds, with a statement "declaring the purpose, or purposes," for which they were to be used, those purposes having been carefully classified in the mortgage.

The question is thus presented, whether the trustee rested under an implied legal duty or obligation springing from the relation of trustee and *cestui que trust*, or whether an implied covenant to that effect can be read into the mortgage under seal.

It is the settled law that in order to imply a covenant in a contract under seal, a manifest and clear intention must appear in the contract that one of the parties shall do the act in regard to which the covenant is to be implied. (*Hornbostel v. Kinney*, 110 N. Y. 94, 99; *Zorkowski v. Astor*, 156 N. Y. 393, 397, 398.)

As to what is a manifestation of a clear intention that one of the parties shall do the act in regard to which the covenant is to be implied is illustrated in the following cases.

In *Booth v. Cleveland Rolling Mill Co.* (74 N. Y. 15) the plaintiffs agreed to give the defendants the exclusive license to manufacture, in certain states, a patented steel and iron rail, the patent of which was owned by the plaintiffs, upon certain specified terms and conditions which related to the royalty to be paid, etc. The defendants were to proceed at once to make said rail as long as it held good as a practicable and reliable rail for use, and it was to be made of good material and in a workmanlike manner. It was held that these conditions in the agreement of license manifested a clear intention that the defendants rested under the implied covenant to manufacture in accordance with these conditions. This covenant was read into the contract under seal, as it was clear upon the face of the contract that this covenant was implied.

Judge ALLEN said in the above case (p. 21): "There is no particular formula of words or technical phraseology necessary to the creation of an express obligation to do or forbear to do a particular thing or perform a specified act. If from the text of an agreement or the language of the parties, either in the body of the instrument or in the recital or references, there is manifested a clear intention that the parties shall do certain acts, courts will infer a covenant in the case of a sealed instrument, or a promise if the instrument is unsealed, for non-performance of which an action of covenant or assumpsit will lie. It is a cardinal principle that every agreement or covenant must be interpreted according to its peculiar terms, and so as to carry out the intent of the parties, and it follows that the ruling upon, and the interpretation of, one agreement will seldom aid in the construction of another, except as it may illustrate some general rule of interpretation applicable to both."

In *Mansfield v. N. Y. C. & H. R. R. Co.* (102 N. Y. 205) it appeared that the plaintiff entered into a contract with the defendant for the construction by the former of the superstructure of an elevator for the latter. The contractors agreed to commence the work within five days after notice from

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

defendant's engineer that the foundations were ready and to complete the elevator ready for use within five months thereafter. The defendant served the notice required, but at the time of such service the piers and foundation walls were not completed. Notwithstanding this omission on the part of the defendant, it was sought to put the plaintiff in default by reason of not completing the superstructure within five months after receiving the notice.

RUGER, Ch. J., after a full examination of the authorities, said: "Looking at this contract in the light of decisions referred to, it would seem that the plainest principles of justice required the implication of a covenant on the part of the defendant to prepare the foundations in question so as to have them in a condition to enable the contractors to prosecute their work to the utmost advantage and economy, before giving the notice which set the time limited for their completion in motion. Any other construction would destroy the mutuality of the agreement and put it practically in the power of one party to defeat performance by the other." Thereupon, an implied covenant was read into this contract under seal.

In *New England Iron Co. v. Gilbert Elevated R. R. Co.* (91 N. Y. 153), in a contract between the plaintiff and the defendant, the plaintiff agreed to furnish the materials and erect on masonry, to be furnished by defendant, an elevated iron railway in the city of New York. The plaintiff was to commence work on being notified by defendant's president that defendant's capital stock was subscribed and thirty per cent paid in. The defendant agreed to designate the order in which the work was to be commenced and completed and to pay therefor a specified price. The plaintiff was not required to prosecute the work any faster than money to be paid therefor should be furnished by the defendant. The defendant subsequently, without giving the prescribed notice, entered into a contract with another corporation for the construction of the work. It was held that although the defendant did not in express terms undertake to do the act or give the notice required to set the plaintiff in motion, a promise to do

so, or at least a promise that the plaintiff should have the building of the railway, in case that enterprise was prosecuted by defendant, was implied.

In *Hudson Canal Co. v. Pennsylvania Coal Co.* (8 Wall. 276) the Supreme Court of the United States, in refusing to read into a contract under seal an implied covenant, uses this language (p. 288): "Undoubtedly, necessary implication is as much a part of an instrument as if that which is, so implied was plainly expressed, but omissions or defects in written instruments cannot be supplied by virtue of that rule unless the implication results from the language employed in the instrument, or is indispensable to carry the intention of the parties into effect; as where the act to be done by one of the contracting parties can only be done upon something of a corresponding character being done by the opposite party, the law in such case, if the contract is so framed that it binds the party contracting to do the act, will imply a correlative obligation on the part of the other party to do what is necessary on his part to enable the party so contracting to accomplish his undertaking and fulfill his contract."

To the same effect is *Hale v. Finch* (104 U. S. 261). At page 269 the court says: "But according to the authorities, including some of those above cited, and from the reason and sense of the thing, a covenant will not arise unless it can be collected from the whole instrument that there was an agreement, or promise, or engagement, upon the part of the person sought to be charged, for the performance or non-performance of some act."

In the light of these authorities, there is nothing in the language of the mortgage before us to warrant reading into that instrument an implied covenant, imposing upon the trustee the affirmative obligation, already discussed, in paying out these bonds or their proceeds to the railroad company.

The covenants contained in the mortgage on the part of the railroad company are made with its future bondholders, and to these covenants the trustee is a stranger; consequently, the principle declared in the cases cited does not apply, as there

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

is nothing in the language of these covenants that can be ascribed to the defendant and construed as implying a correlative covenant which should be read into a sealed instrument as binding the trustee.

It is to be observed that the person against whom an implied covenant is read into a sealed instrument is an active covenanting party therein, and the question is whether on considering the language of the covenants the writing contains, others must not be implied therefrom, of a correlative character, in order to carry out the intention of the parties.

In the case at bar the defendant, the Farmers' Loan and Trust Company, is named as party to the mortgage, not as entering into its positive covenants, but for the purpose of accepting the trust therein created. In executing that acceptance the defendant created the relation of trustee and *cestui que trust* between it and the future bondholders. It is in this relation equity finds a foundation upon which to rest its jurisdiction and imply duties and obligations, which, in the absence of any covenants in the mortgage, entered into by the defendant, cannot be read into that instrument.

It, therefore, follows that an implied duty or obligation existed requiring the trustee to advance to the railroad company the bonds, or their proceeds, upon proper demands and specific statements of the latter, indicating a purpose to use the same in accordance with the provisions of the mortgage.

It seems only reasonable that the bondholders should be protected by the positive covenants of the mortgagor and all of those obligations that may be fairly implied as resting upon the trustee. It is unfortunately the case that the duties of trustees under railroad and other mortgages are too often performed in a perfunctory manner unless there is default in the payment of interest and the trustees are called upon to take possession of the property and foreclose the mortgage in pursuance of the express duties imposed upon them.

The strict enforcement, when possible, of these implied obligations imposed upon trustees would be salutary and timely.

It follows that this action cannot be considered as brought upon the mortgage as a sealed instrument, but on this implied duty or obligation springing from the trust relation.

This being so, the twenty years' Statute of Limitations, relating to an action upon a sealed instrument, does not apply, but the cause of action falls within the provisions of section 388 of the Code of Civil Procedure, which is general in its character, to the effect that "An action, the limitation of which is not specially prescribed in this or the last title, must be commenced within ten years after the cause of action accrues."

The trust company delivered the last lot of bonds to the railroad company in the month of June, 1885, and these actions were begun in February, 1899. The statute must be deemed to have been set running by this last delivery of the bonds.

The learned Appellate Division in sustaining the demurrers of defendant to the replies of plaintiffs and dismissing the complaints upon the merits, held (1) that there were no duties imposed upon the trustee independently of the mortgage; that these actions are to be regarded as brought upon a sealed instrument, and can only be cut off by the twenty years' Statute of Limitations; and (2) that the complaints taken as a whole contain no enforceable cause of action against the trust company.

It was, therefore, ordered that the judgments of the Special Term dismissing the complaints should be affirmed.

While we are unable to agree with the views expressed by the Appellate Division in regard to the nature of the cause of action, or the duties of the trustee, we concur in the result reached that the complaint was properly dismissed, placing our decision upon the fact that the cause of action is cut off by the ten years' Statute of Limitations.

In *Frishmuth v. Farmers' Loan & Trust Co.* (95 Fed. Rep. 5) the Circuit Court of the United States for the southern district of New York, in construing the mortgage now before us, held that the duties assumed by a

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

trustee to a railroad mortgage, as made for the benefit of bondholders, are not only those which are defined by the instrument, but others are superimposed on the trustee created by the relation of the parties and the situation of the trust fund, but that the cause of action to enforce the latter was cut off by the Statute of Limitations, for the reason that fourteen and one-half years had elapsed since the delivery of the last lot of bonds by the trustee to the railroad company. This judgment was affirmed by the Circuit Court of Appeals in 107 Federal Reporter, 169.

As already stated, one of the plaintiffs is the owner of twenty bonds purchased in 1887, and the other of five bonds purchased in 1889.

We thus have before us the owners of only twenty-five out of fifteen thousand bonds, who purchased long after the trustee had issued all the bonds to the railroad company.

The breach of trust by the trustee existed at the time these bonds were acquired, and a reasonable examination of the public records and *locus in quo* in the state of Oregon would have disclosed a condition of affairs calculated to satisfy a reasonable man that the securities were of little or no value. The land grants would have been matter of record if existing, and the length of the constructed and equipped railroad was readily ascertainable.

The complaint alleges, and it is admitted, that the construction of the railroad was commenced about July, 1881, and only seventy-two miles were completed in October, 1884; that this work was so defectively and cheaply done as not to cost twenty-five bonds, or the proceeds thereof, per mile; that it was not until 1886 that the railroad was extended ten miles to Albany, Linn county, Oregon; that in 1889 the railroad was extended into the Cascade mountains, a point distant about one hundred and forty-two miles from Yaquina bay, when the work of construction was stopped and never resumed; that this total mileage of railroad was so defectively and cheaply constructed and equipped as to be substantially worthless and of no value for the security of bondholders.

The judgments appealed from should be affirmed, with costs.

MARTIN, J. (dissenting). The trust deed in this case was in form and effect a tripartite agreement between the Oregon Pacific Railroad Company of the first part, the Farmers' Loan and Trust Company of the second part, and the Willamette Valley and Coast Railroad Company of the third part. By its terms the parties of the first and third parts transferred to the defendant in trust for the purposes therein mentioned all the property and franchises owned by them. The party of the first part covenanted and agreed that when the bonds provided for by such trust deed had been executed it would deposit them with the defendant to be issued and certified as the same should be sold or otherwise disposed of. The defendant was authorized to certify and issue such bonds for sale when required by the party of the first part, but the net proceeds realized therefrom were to be paid over to and remain in the hands of the defendant for the purposes set forth in that instrument. There was also an express provision therein that such proceeds should be paid out only on the written order or request of the executive committee or the board of directors of the party of the first part, such orders or requests to include a written statement of the purpose for which such proceeds were to be appropriated. It then provided for the issuing of bonds to be directly applied to the purposes of the corporation without their conversion, but required that the trustee should be furnished with a like written order and request which should include a written statement declaring the purposes for which such bonds were to be employed, and only in such case was the trustee authorized to certify, issue and deliver such bonds.

The question here presented is whether these provisions of the trust deed, which clearly imposed upon the defendant the duty of retaining the bonds executed and the net proceeds of those issued and sold until called for, for the purposes and in the manner therein stated, constituted a covenant to that

N. Y. Rep.] Dissenting opinion, per MARTIN, J.

effect upon the part of the defendant, or whether such a covenant is necessarily implied from the provisions of that instrument. If this action is upon a covenant therein, either express or necessarily implied, then, obviously, it is upon a sealed instrument, the twenty years' Statute of Limitation applies, and the complaint should be sustained. By this deed the defendant was constituted a trustee, and signed and executed it for the purpose of signifying its acceptance of the trust therein and thereby created. The nature of the trust, which the defendant covenanted to accept and carry into effect, included the receipt and issuing of the bonds executed by the party of the first part, and the receipt and retention of the proceeds of such bonds as were sold until paid out or delivered in accordance with the express terms of the instrument by which the trust was created. It is said that while the defendant is liable to the bondholders for its misconduct in disposing of the bonds or their proceeds contrary to the provisions of the trust deed, yet that such liability arises only from its implied duty as trustee to the bondholders. The relation of trustee and *cestui que trust*, if it exists, arose from and was created and controlled by the provisions of the trust deed, and it appears to me that the defendant's liability is not dependent upon the general principle controlling trustees, where there are no special provisions as to the character of their duties and liabilities, but is dependent upon the particular provisions contained in the trust deed under and in pursuance of which it specifically accepted the trust thereby conferred upon it. If there was no covenant, express or implied, by the defendant to deliver the bonds and pay out the proceeds in the manner and in accordance with the requirements of the trust deed, then there was no covenant whatever to return the bonds or the proceeds, or to account therefor. I think it is quite clear that it cannot be properly held that there was no express or implied covenant on the part of the defendant to apply the bonds or their proceeds to the purposes, in the manner, and subject to the limitations contained in that instrument. Manifestly, the sole purpose of the mortgage and of the bonds to be issued was

to secure funds to be applied to the particular purposes specified, and to limit their application to such purposes alone. That it was the plain intent of the parties to enter into covenants whereby the bonds and the proceeds thereof should be held by the defendant in trust, under and subject to the provisions and limitations of that agreement, and that they should be so retained by it until all the provisions thereof in that respect were complied with, seems to me quite obvious from the language therein employed. If from the text of an agreement under seal, either in the body of the instrument or in the recitals or references, there is manifested a clear intention that one of the parties shall do certain acts in a particular and specified manner, a covenant to that effect will be implied, for the non-performance of which an action of covenant will lie. The meaning of a contract is to be gathered from a consideration of all its provisions, and the inferences naturally derivable therefrom, as to the intent and object of the parties in making it, and the result which they intended to accomplish by its performance. The object of the parties to the trust deed and the actual result which they intended to accomplish was to secure money or bonds to be applied to the particular purposes specified, and to prevent their use for any other purpose whatsoever. To that end it was expressly provided by the instrument itself that the property of the other parties should be transferred to the defendant, and that bonds should be executed and delivered to it, to be issued by it only upon the assurance that they or their proceeds would be thus applied. It is true that in order to imply a covenant in a contract under seal, the manifest and clear intention must appear in the contract that one of the parties shall do or omit the act in regard to which the covenant is to be performed. (*Booth v. Cleveland Rolling Mill Co.*, 74 N. Y. 15; *Mansfield v. N. Y. C. & H. R. R. R. Co.*, 102 N. Y. 205; *New Eng. Iron Co. v. Gilbert El. R. R. Co.*, 91 N. Y. 153; *Hornbostel v. Kinney*, 110 N. Y. 94; *Bruce v. Fulton Nat. Bank*, 79 N. Y. 154; *Zorkowski v. Astor*, 156 N. Y. 393.)

As to the rule applicable to the construction of this instrument, I agree with my brother BARTLETT, that a covenant on the part of the defendant, of the nature suggested, is not to be implied unless it was the clear intention of the parties that the defendant should not issue the bonds or pay out the proceeds except upon a full compliance with the terms of the trust deed or mortgage in that respect. It appears to me, however, that it was their plain intention, as disclosed by the language and provisions of the trust deed, that the bonds or their proceeds should be employed only for the purposes specifically mentioned therein; that to carry that intent into effect it was expressly provided that they were to be used for that purpose only, and a method of procedure to be adopted by the defendant was provided which would furnish it with information of the purposes for which they were to be employed, thus enabling it to carry out such intent. The evident purpose of these provisions was to protect the railroad company and its bondholders against any attempt on the part of its officers or others to misapply the bonds or their proceeds, and the defendant was made a party to that agreement to prevent that result. If these provisions were not intended as a covenant to bind the defendant and restrain it from delivering the bonds or paying out the proceeds thereof, except upon the conditions and only in compliance with the terms of the trust deed, they were practically meaningless and afforded no protection to the company or its bondholders. The trust imposed upon the defendant, which it in terms accepted and which, at least by implication, it covenanted to perform, was not a general one by which it was authorized to issue the bonds and transfer them or the proceeds to the party of the first part or to others whom it should designate, or to dispose of the proceeds in that manner, but it was a trust which, while it conferred upon the defendant the property of the other parties to the agreement, yet specifically restricted the defendant as to the use to be made of such bonds or proceeds, and required it to apply them only to the purposes specially enumerated, to be ascertained in the manner provided. Such being the nature of the

trust conferred upon the defendant, it is obvious that it was the intent of the parties that it should be carried out according to the spirit and purpose of those provisions. If that was not the intent of the defendant, but it intended to ignore or disregard the provisions of the agreement and permit the entire property of the corporation to be squandered, then it intended to commit a fraud upon the bondholders and others who were interested in the contemplated railroad. We cannot believe that such was the defendant's intent, but feel confident that the intent and purpose of the defendant, as well as the other parties to the agreement, was that these provisions should be fairly and conscientiously carried into effect. I am of the opinion that when the defendant executed the trust deed for the avowed purpose of signifying its acceptance of the trust therein and thereby created, it in effect agreed and intended to agree and bind itself to carry into effect and comply with the terms and provisions of the trust therein provided for, subject to and including all the conditions, provisions and limitations contained therein, and that a covenant to that effect is necessarily implied.

I vote for reversal.

PARKER, Ch. J., CULLEN and WERNER, JJ., concur with BARTLETT, J.; O'BRIEN and VANN, JJ., concur with MARTIN, J.

Judgment affirmed.

In the Matter of the Opening of LUDLOW STREET in the City of Yonkers.

JAMES B. LUDLOW et al., as Executors of THOMAS W. LUDLOW, Deceased, Appellants; THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondent.

RAILROADS — PROVISIONS OF CHAPTER 754 OF LAWS OF 1897, AMENDING SECTION 61 OF RAILROAD LAW, MUST BE COMPLIED WITH, ALTHOUGH PROCEEDING TO LAY OUT STREET ACROSS RAILROAD TRACKS WAS COMMENCED BEFORE ENACTMENT OF STATUTE. The provisions of chapter 754 of the Laws of 1897, amending section 61 of the Railroad Law (L. 1890, ch. 565), are intended to require the steps named therein to be taken

N. Y. Rep.]

Statement of case.

by municipalities in the laying out of streets across railroads in addition to the requirements of their several charters and existing general law; and the determination of the authorities of a city, in a proceeding to lay out a street across the tracks of a steam railroad, although initiated by petitioners before the enactment of the statute, and in conformity with the charter, but not acted upon by the common council otherwise than by reference to the board of street opening until after the statute took effect, is ineffectual to authorize subsequent proceedings taken under such determination, where no opportunity was given to the railroad corporation to be heard before the municipal authorities upon the question of the necessity of such street, and no application was made to the board of railroad commissioners for permission to lay out such street across the railroad tracks, as required by the statute.

Matter of Ludlow Street, 59 App. Div. 180, affirmed.

(Argued November 10, 1902; decided December 9, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered March 25, 1901, which affirmed an order of Special Term vacating the appointment of commissioners of estimate and assessment in proceedings to open Ludlow street, in the city of Yonkers, and all proceedings subsequent thereto.

The facts, so far as material, are stated in the opinion.

James B. Ludlow and *B. Learned Hand* for appellants. The Grade Crossing Law does not apply to the proceeding which was vacated and set aside by the order appealed from. (*Craig v. Town of Aules*, 93 N. Y. 405; *People ex rel. v. Nash*, 15 N. Y. Supp. 29; *City of Yonkers v. N. Y. C. & H. R. R. Co.*, 165 N. Y. 142; *Matter of D. & H. C. Co.*, 129 N. Y. 105; *People ex rel. v. Keller*, 157 N. Y. 90; *People ex rel. v. N. Y. C. & H. R. R. Co.*, 158 N. Y. 410; *Matter of Waverly*, 158 N. Y. 710.) In no event was the court below warranted in making an order vacating the order of April 30, 1898, which was an order duly made in a condemnation proceeding and all proceedings subsequent thereto. (*Matter of Zborowski*, 68 N. Y. 88; *Whitney v. Mayor, etc.*, 6 Abb. [N. C.] 329; *People v. Yonkers*, 39 Barb. 266; *People ex rel. v. Rochester*, 5 Lans. 11; *Matter of Folsom*, 2 T. & C. 55; 56 N. Y. 60; *Lyth v. City of Buffalo*, 48 Hun,

175; *D. C. M. Ins. Co. v. Van Wagonen*, 132 N. Y. 398; *Matter of Comrs. of Central Park*, 50 N. Y. 493, 495-497; *Matter of Board of Street Opening*, 111 N. Y. 581, 583; *People ex rel. v. D., L. & W. R. R. Co.*, 11 App. Div. 280; 159 N. Y. 545.)

Ira A. Place and *Robert A. Kutschbock* for respondent. The application made by the railroad company to vacate and set aside the order appointing commissioners was the proper remedy. (*Matter of N. F. & W. R. Co.*, 121 N. Y. 319; *Matter of One Hundred and Eighty-first Street*, 35 N. Y. S. R. 548; 126 N. Y. 641; *Matter of One Hundred and Sixty-third Street*, 61 Hun, 365.) The determination of this municipal corporation of April 11, 1898, determining the street to be necessary, and each and every step taken by the municipal corporation subsequent thereto, is wholly void. (*People ex rel. v. N. Y. C. & H. R. R. Co.*, 158 N. Y. 410; *City of Yonkers v. N. Y. C. & H. R. R. Co.*, 32 App. Div. 474; 165 N. Y. 142; *Matter of Vil. of Waverly*, 35 App. Div. 40; *Matter of Third Ave.*, 30 App. Div. 256; *Matter of Delavan Ave.*, 167 N. Y. 256.) The provisions of section 61 of the Railroad Law applied to and governed this proceeding. (*People ex rel. v. N. Y. C. & H. R. R. Co.*, 156 N. Y. 570; *People ex rel. v. N. Y. C. & H. R. R. Co.*, 158 N. Y. 410; *Brehm v. Mayor, etc.*, 104 N. Y. 190; *Southwick v. Southwick*, 49 N. Y. 510; *Matter of Davis*, 149 N. Y. 539.)

PARKER, Ch. J. In pursuance of the charter of the city of Yonkers, certain property owners, on November 23, 1896, filed a petition with the common council of that city praying that a street be so laid out that it should cross the steam surface railroad of the respondent. The petition was on that day duly referred to the board of street opening, which reported thereon on December 27, 1897, approving the petition. In the meantime, however, chapter 754 of the Laws of 1897 was passed—taking effect July 1, 1897, some months

N. Y. Rep.] Opinion of the Court, per PARKER, Ch. J.

before the report was made—which act so amended the Railroad Law that the first part of section 61 was made to read as follows:

“When a new street, avenue or highway, or new portion of a street, avenue or highway shall hereafter be constructed across a steam surface railroad, such street, avenue or highway, or portion of such street, avenue or highway, shall pass over or under such railroad or at grade as the board of railroad commissioners shall direct. Notice of intention to lay out such street, avenue or highway, or new portion of a street, avenue or highway, across a steam surface railroad, shall be given to such railroad company by the municipal corporation at least fifteen days prior to the making of the order laying out such street, avenue or highway by service personally on the president or vice-president of the railroad corporation, or any general officer thereof. Such notice shall designate the time and place and when and where a hearing will be given to such railroad company, and such railroad company shall have the right to be heard before the authorities of such municipal corporation upon the question of the necessity of such street, avenue or highway. If the municipal corporation determines such street, avenue or highway to be necessary, it shall then apply to the board of railroad commissioners before any further proceedings are taken, to determine whether such street, avenue or highway shall pass over or under such railroad, or at grade, whereupon the said board of railroad commissioners shall appoint the time and place for hearing such application, and shall give such notice thereof, as they judge reasonable, not, however, less than ten days, to the railroad company whose railroad is to be crossed by such new street, avenue or highway, or a new portion of a street, avenue or highway, to the municipal corporation and to the owners of land adjoining the railroad and that part of the street, avenue or highway to be opened or extended.” The remaining part of the section has no direct bearing upon the question before the court.

After a careful examination of the section, in the light of

the object sought to be accomplished by the law-making power, our conclusion is that the legislature intended to require the steps named therein to be taken by municipalities in the laying out of streets across railroads, in addition to the requirements of their several charters and existing general law. The procedure provided for by the various charters throughout the state, differing as they do in detail, was to be left in force, as furnishing the general basis for laying out and opening new streets throughout the several municipalities; but in view of the public importance of the attempt to gradually do away with grade crossings, especially in dangerous locations, and of the fact that one-half of the expense was to be borne by the railroad corporation to be crossed by the new highway, it was deemed but just that the railroad corporation interested should have an opportunity to be heard before the municipal authorities on any such proposed new road; so this act was passed, providing that notice should be given of an intention to lay out such a street, avenue or highway and that it should be given by service personally upon the president or vice-president of the railroad corporation or any general officer thereof, and that such railroad corporation should have the right to be heard before the municipal authorities upon the question of the necessity of such street, avenue or highway.

In our view, as we have already suggested, it was the legislative purpose that this statute should apply to all the various charters of the state, imposing the additional requirements named therein upon the several municipalities seeking to open new highways across railroad tracks; so, after the board of street opening made their report and the common council took the proceedings required by the charter to open and lay out the highway, giving the notice required by the charter and taking the other steps, as it did, strictly in conformity therewith, there should have been observed in addition thereto the requirements of § 61 (*supra*), under which notice of the intention to lay out this street should have been given to the respondent, and an opportunity for hearing afforded in the

N. Y. Rep.]

Statement of case.

manner pointed out by the statute. In the event of a determination by the municipal authorities to lay out the highway, then, as required by the statute, and before any other proceedings were taken, application should have been made to the board of railroad commissioners for them to decide whether the street should be carried across the railroad, over or under or at grade. These steps having been omitted by the local authorities, it follows that the subsequent proceedings had by direction of the municipal authorities, viz., the application for the order at Special Term appointing commissioners to estimate and assess the expenses of the improvement and the amount of damages and the benefits, and all subsequent proceedings in pursuance thereof, were without authority. The courts below, therefore, properly held that upon the application of the respondent those proceedings should be set aside.

The order should be affirmed, with costs.

O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and CULLEN, JJ., concur.

Order affirmed.

In the Matter of the Estate of MARY KILLAN, Deceased.
MARTIN KILLAN, Appellant; MILES T. O'REILLY, Respondent.

1. SURROGATE'S COURT—APPEAL—WHEN CONCLUSIONS OF LAW FOUND IN SUPPORT OF DECREE SETTLING AN INTESTATE'S ESTATE REVIEWABLE IN COURT OF APPEALS. Exceptions to a surrogate's conclusions of law, in dismissing a proceeding in a Surrogate's Court, present questions of law which are reviewable by the Court of Appeals upon an appeal from an order of the Appellate Division affirming the decree of the Surrogate's Court entered upon and in accordance with such conclusions of law.

2. SAME—JUDICIAL SETTLEMENT OF ADMINISTRATOR'S ACCOUNTS VOID AS AGAINST INTERESTED PARTIES NOT CITED OR APPEARING THEREON—EFFECT OF CODE CIV. PRO. §§ 2518-2523. A judicial settlement of the accounts of an administrator of an estate is void as against persons interested in the estate, within the meaning of the statute (Code Civ. Pro. § 2514, subd. 11), whether known or unknown, who were not duly cited to appear, or did not appear voluntarily at such judicial settlement; since the Code of Civil Procedure (§§ 2518-2523) provides ample protection to

Statement of case.

[Vol. 172.]

such administrator by permitting him to sue out a citation running against persons unknown.

3. UNKNOWN BROTHER OF AN INTESTATE NOT CITED OR APPEARING AT JUDICIAL SETTLEMENT OF ESTATE, MAY INSTITUTE PROCEEDINGS FOR NEW ACCOUNTING UPON NOTICE TO PARTIES INTERESTED AND PROOF OF HIS RELATIONSHIP. A person residing in a foreign country and claiming to be the brother and only next of kin of an intestate, in whose estate there has been a judicial settlement of the accounts of the administrator, to which claimant was not cited and was not a party, is entitled to institute a proceeding in the Surrogate's Court against the administrator for a new accounting under the provisions of the statute (Code Civ. Pro. § 2726, subd. 1, and § 2727), and to an order that a commission issue, with interrogatories, for the examination of the petitioner and his witnesses; and it is reversible error to dismiss such proceeding and deny the application for a commission and remit the petitioner to a motion to open the decree in such judicial settlement, addressed to the discretion of the Surrogate's Court; the proper practice is not to dismiss the proceeding, but to require the petitioner to amend his citation and bring in the parties who were cited or appeared on the original accounting, that all of such parties may join in the application for a commission and be represented at the execution thereof; the petitioner, if he succeeds in establishing that he is a brother of the intestate, may then have an accounting under the provisions of the Code invoked by him.

Matter of Killan, 66 App. Div. 812, reversed.

(Argued October 9, 1902; decided December 9, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, made November 12, 1901, which affirmed a decree of the Monroe County Surrogate's Court dismissing proceedings instituted by the appellant herein for a judicial settlement of the accounts of the respondent herein as administrator of the estate of Mary Killan, deceased, and also denying an application for a commission to issue to take testimony in a foreign country.

The facts, so far as material, are stated in the opinion.

George D. Peck and *Myron D. Short* for appellant. The proceeding which resulted in the alleged decree of February 7, 1900, was not binding or in any way conclusive upon the appellant, as the Surrogate's Court acquired no jurisdiction

N. Y. Rep.]

Points of counsel.

of his person. He was not cited therein, neither did he appear. (*Matter of Killan*, 66 App. Div. 312; Code Civ. Pro. §§ 2742, 2743; 1 Freem. on Judg. [4th ed.] 277, § 154; *Hood v. Hood*, 19 Hun, 300.) The decree of February 7, 1900, being absolutely void and inoperative as to the appellant, he was at liberty to wholly disregard it. (*Beardslee v. Dolge*, 143 N. Y. 165; *Ferguson v. Crawford*, 70 N. Y. 254; *Dutton v. Smith*, 10 App. Div. 568; 1 Freem. on Judg. [4th ed.] §§ 117, 120a; *Julian v. Woolsey*, 87 Hun, 326; *Matter of Kimball*, 18 App. Div. 320; Redf. on Surrogate's Courts [5th ed.], 826.) The remedy and proceeding so instituted by petition and citation by the appellant in the Surrogate's Court was the proper one and the one expressly authorized by statute. (Code Civ. Pro. §§ 2726, 2727; Jessup's Surr. Pr. 1304; Redf. on Surrogate's Courts [5th ed.], 768; 1 Freem. on Judg. [4th ed.] 347, § 190; *Hood v. Hood*, 19 Hun, 300; 85 N. Y. 561; *Dutton v. Smith*, 10 App. Div. 566; *Matter of Lamb*, 19 Misc. Rep. 638; *Jenkins v. Young*, 35 Hun, 569; *Denton v. O. C. Nat. Bank*, 150 N. Y. 126; *Jackson v. Brown*, 3 Johns. 459; *Foote v. Lathrop*, 41 N. Y. 558, 561; *Matter of McCunn*, 15 N. Y. S. R. 712; *People ex rel. v. Brown*, 103 N. Y. 684; *Matter of Baldwin*, 87 Hun, 372.) To require the appellant to adopt as his only remedy in this case a motion addressed to the discretion of the Surrogate's Court is to deny him due process of law. (*People ex rel. v. Supervisors*, 70 N. Y. 228; *Ward v. Boyce*, 152 N. Y. 191; 2 Kent's Comm. 13; *Happy v. Mosher*, 48 N. Y. 313; *Jenkins v. Youngs*, 35 Hun, 569; *People v. Dunn*, 157 N. Y. 528; *People v. Sickles*, 156 N. Y. 541.) The surrogate erred in taking judicial notice of the proceedings upon the alleged former accounting. (1 Greenl. on Ev. [15th ed.] §§ 522, 523; *Matter of Baldwin*, 87 Hun, 372, 377; *Matter of McCunn*, 15 N. Y. S. R. 712; 17 Am. & Eng. Ency. of Law [2d ed.], 926.)

James M. E. O'Grady for respondent. The procedure indicated by the decision of the surrogate and the Appellate

Division is the correct procedure. (Code Crim. Pro. § 2481, subd. 6; *Bolton v. Schriever*, 135 N. Y. 65; *Staples v. Fairchild*, 3 N. Y. 41; *Roderigas v. E. R. S. Inst.*, 63 N. Y. 460; *Welch v. N. Y. C. & H. R. R. Co.*, 53 N. Y. 610; *Seaman v. Whitehead*, 78 N. Y. 306; *Vreedenberg v. Calf*, 9 Paige, 128; *Matter of Hood*, 90 N. Y. 512; *O'Connor v. Huggins*, 113 N. Y. 511; *Matter of Lamb*, 10 Misc. Rep. 638; *Matter of Hawley*, 100 N. Y. 206.) The court committed no error in taking judicial notice of the decree of February 7, 1901. (Code Civ. Pro. § 2472, subd. 4; *Matter of Underhill*, 117 N. Y. 471; *Bearns v. Gould*, 77 N. Y. 459; *Harris v. Clark*, 87 N. Y. 572; *Kelly v. West*, 80 N. Y. 139.)

BARTLETT, J. The petitioner, as the alleged brother and only next of kin of the intestate, proceeds under section 2726, subdivision 1, and section 2727 of the Code of Civil Procedure, which provide that a judicial settlement of the accounts of an administrator may be compelled by the next of kin, or any party in interest, after the expiration of one year from the issuance of letters of administration. The Code defines who is a "person interested" as follows: "The expression, 'person interested,' where it is used in connection with an estate or a fund, includes every person entitled, either absolutely or contingently, to share in the estate or the proceeds thereof," etc. (Code Civ. Pro. § 2514, subd. 11.)

Mary Killan died intestate at Rochester on the 24th day of August, 1898. In the following October letters of administration were issued to Miles T. O'Reilly as a creditor, on his own behalf, he being the undertaker who attended to the funeral, etc., of the deceased.

The decedent left personal property amounting to the sum of \$1,514.77.

In December, 1899, proceedings were instituted to settle the accounts of the administrator, and certain persons appeared who claimed to be cousins of the intestate. The administrator contested these claims, and the surrogate after trial adjudged

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

and decreed that claimants were cousins of the intestate, her only heirs at law and next of kin and entitled to share in her estate.

In February, 1900, the surrogate made his decree, adjudging and commanding the administrator to distribute the estate to these cousins after payment of debts, expenses, commissions, etc.

In January, 1901, this petitioner, Martin Killan, residing in Ireland, filed his petition in the Surrogate's Court of Monroe county, in which he claimed to be the sole next of kin of the intestate, and after setting forth the issuing of letters of administration, alleged that no accounting had been made by the administrator and asked for a citation directing him to show cause why he should not render an account. This petition is based on the fact that the petitioner was not a party to the proceedings for accounting and distribution although a brother of the intestate. Thereupon citation was duly issued by the Surrogate's Court and the administrator appeared and served his answer to the petition, wherein he set forth the accounting proceedings and his due discharge; also denied that petitioner is a brother of the deceased. Thereafter petitioner moved for an order that a commission issue authorizing him to examine the petitioner therein and eight other witnesses upon interrogatories and to make certificate of the same to the Surrogate's Court. The motion was denied and this proceeding dismissed, with costs, and a decree and order entered to that effect, which the Appellate Division affirmed on appeal.

The learned surrogate, on dismissing the proceeding, delivered an oral opinion, in part, as follows: "The court holds that the proceedings upon the judicial settlement of the administrator are before the court, of which it takes judicial notice, by which it appears that there has been a judicial settlement of the accounts of the administrator of this estate *to which claimant was not a party. He was neither cited nor did he appear.* The court further holds that the decree made therein *is entirely inoperative as to this claimant,* but that the court

having acquired jurisdiction of the subject-matter of the judicial settlement and the estate having been settled in that proceeding, it is incumbent upon this claimant to now come in under that proceeding by petition or otherwise and ask that it be opened, giving notice to the persons who then appeared and were affected by that decree, and that the administrator cannot be compelled to account independently, he having already accounted and his account being filed and before the court, at the instance of any number of claimants who may invoke the aid and process of the court for that purpose."

The Surrogate's Court made the following findings, among others: "That the hearing upon said motion was continued until the 7th day of April, 1901, upon which occasion said petitioner appeared by counsel and said administrator appeared by counsel and moved that the application for the order be denied and that the proceedings for the accounting be dismissed."

"It appears from the proceedings upon the judicial settlement of the accounts of the administrator which are before the court and of which the court takes judicial notice, that there has been a judicial settlement of the accounts of the administrator of this estate *to which the claimant was not a party*; that the court acquired jurisdiction of the subject-matter of the judicial settlement and the estate has been settled in that proceeding."

The surrogate made three conclusions of law, the third of which reads as follows: "That the order that a commission issue to (naming commissioner), authorizing him to examine the petitioner herein, and also (naming eight witnesses) as witnesses for the petitioner, under oath, upon interrogatories to be annexed to such commission, and to take and certify the depositions of the petitioner and of such witnesses and to return the same with the commission through the post office or according to the directions therein or therewith given, be and the same hereby is denied; and that the proceeding against the administrator for a new accounting be and the

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

same hereby is dismissed, and that the said administrator have twenty-five dollars costs and his disbursements."

The petitioner duly excepted to these conclusions of law, and we thus have presented the question whether the dismissal of this proceeding can be justified as matter of law. The dismissal of the proceeding resulted in a final decree. (*Village of Champlain v. McCrea*, 165 N. Y. 264.)

Under these findings the decree of the Surrogate's Court in the original accounting proceeding is void as to this petitioner.

"It is an elementary principle, recognized in all the cases, that to give binding effect to a judgment of any court, whether of general or limited jurisdiction, it is essential that the court should have jurisdiction of the person as well as of the subject-matter, and that the want of jurisdiction over either may always be set up against the judgment when sought to be enforced, or any benefit is claimed under it." (*Ferguson v. Crawford*, 70 N. Y. 253, 256; *Hood v. Hood*, 85 N. Y. 578.)

In Freeman on Judgments (4th edition, vol. 1, § 117) the learned author says: "A void judgment is in legal effect no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void."

The only question presented by this appeal is whether the petitioner was liable to have his proceeding for an accounting dismissed and he remitted to a motion to open the decree in a proceeding absolutely void *as to him*.

It is well settled that an application to a court to open its judgment is always addressed to its sound discretion, and that the denial of the motion involves no substantial right.

In *Foote v. Lathrop* (41 N. Y. 358, 361) it was held that an order of the Supreme Court denying a motion to set aside a regular judgment in that court upon the ground that the defendant was not served with process, and the appearance for him was wholly unauthorized, is not appealable to this

court; that no party has a substantial right, within the meaning of the Code, to have a regular judgment against him set aside on motion; that it is in the discretion of the court, in which such judgment was rendered, to set it aside or not; and even if void they may leave the party affected by it to show it so in a proper action. Judge GROVER said: "It would still rest in the discretion of the court whether to entertain a motion to vacate the judgment, or leave her to show the judgment void, as to her, whenever interposed as an obstacle to her pursuit of her right to the land." This case was followed in *Beards v. Wheeler* (76 N. Y. 213) and *People ex rel. Brush v. Brown* (103 N. Y. 684).

In *Estate of McCunn* (15 N. Y. State Reporter, 712) this point was involved. An executor of an estate filed an account on which a decree was entered. Some years later he filed a second account, citing therein certain grandnieces of the deceased who were not parties to the first accounting. These grandnieces moved to open the decree on the first accounting on the ground that they had not been made parties. Surrogate ROLLINS of New York, in denying the motion, said: "I am referred to no decided cases which support the notion that persons not parties to an accounting proceeding and not bound by the decree therein, pursuant to section 2742 of the Code, can successfully claim that such decree be opened under circumstances like the present."

The learned courts below erred in holding that the petitioner was not entitled to maintain the proceedings instituted by him and that he must seek his remedy by a motion, which is merely an appeal to the discretion of the court. The petitioner is asking no favor, but is enforcing a substantial right, if it be true that he is a brother of the intestate.

The surrogate was undoubtedly right in suggesting that the petitioner should give notice to the persons who appeared in and were affected by the original proceedings. The proper practice was not to dismiss the proceeding instituted by this petitioner, but to require him to amend his citation and bring in the parties who were cited or appeared on the original

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

accounting. The petitioner having complied with this requirement would be in a position to apply for a commission with interrogatories, and the parties cited could join therein and be duly represented at the execution thereof. The citation should be amended as suggested. If the petitioner succeeds in establishing that he is a brother of the intestate he is entitled to an accounting under the provisions of the Code which he has invoked.

The respondent has argued a number of points that possibly should receive special consideration, although most of them are covered by that which we have already said and the authorities cited.

We have the positive finding of the Surrogate's Court that the petitioner in this proceeding was not cited in the accounting proceedings and was not a party thereto, and that the same was wholly inoperative as to him. It is at this point that we encounter the defect in the administrator's proceedings for an accounting that has led to his present peril of being called on to account for funds paid out under a decree that does not protect him against this petitioner if the latter establishes the fact that he is intestate's brother.

It is argued that it would be a strange miscarriage of justice if the administrator, after having proceeded to an accounting and obtained a decree directing him to pay over to certain parties, could be compelled to again account in an independent proceeding on the petition of some one claiming to be nearer of kin than those cited or appearing in the prior proceedings, and consequently entitled, if the claim is established, to the personal property of the testator.

We have presented here the ordinary situation of a person not joined as a necessary party in an action or special proceeding ignoring the judgment therein, and proceeding, as this court said he might in *Foot v. Lathrop* (41 N. Y. 358, 361), to show the judgment void when interposed as an obstacle to the remedy he has invoked.

An administrator is not left in the helpless and unprotected position that is assumed to be the case in the argument of the

respondent. The Code of Civil Procedure provides for his ample protection by permitting him to sue out a citation running against persons unknown. (§§ 2518-2523.) A citation properly issued under these provisions binds unknown next of kin precisely as if they were named therein. There is no evidence in the record that any effort was made to cut off unknown next of kin, and the citation that was issued is not before us. On the contrary, as already pointed out, it is expressly found that the petitioner was not a party to the former proceeding. This administrator is in the position of any plaintiff who proceeds to judgment without joining all of the necessary parties defendant.

The effect of the judicial settlement of an account is stated in section 2742 of the Code: "A judicial settlement of the account of an executor or administrator, either by the decree of the Surrogate's Court, or upon an appeal therefrom, is conclusive evidence against all the parties *who were duly cited or appeared*, and all persons deriving title from any of them," etc.

It follows that the decree in the accounting proceeding binds only the parties thereto, and the administrator not having cut off unknown next of kin is liable to respond to any claim that one or more of them may successfully make.

The respondent has cited a number of cases relating to the jurisdiction of the court as to the subject-matter, apparently overlooking the fact that no question is raised on this appeal as to the jurisdiction of the Monroe County Surrogate's Court of the estate of the intestate.

The contention of the appellant is that the court acquired no jurisdiction of his person, and the record conclusively supports this position.

We are referred to Mr. Redfield's Surrogate Practice (p. 865, fifth edition), where he discusses the subject of evidence of jurisdictional facts. The learned author observes: "The rule is stated to be that 'when certain facts are proved to a court or officer, having only special and limited jurisdiction, as a ground for issuing process, and there is a total

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

defect of evidence as to any essential fact, the process will be void; but where the proof has a legal tendency to make out a proper case, in all its parts, for issuing the process, then, although the proof may be slight and inconclusive, the process will be valid until set aside by a direct proceeding for that purpose.' ”

This quotation is from *Staples v. Fairchild* (3 N. Y. 41). This case involved the regularity of certain attachment proceedings and discusses the powers of courts of limited jurisdiction. It is a direct authority in favor of the petitioner herein on the point that the court acquired no jurisdiction of his person. The learned judge says: “It is well settled that when certain facts are to be proved to a court having only such a jurisdiction, as a ground for issuing process, if there be a total defect of evidence as to any essential fact, the process will be declared void, in whatever form the question may arise.”

It is unnecessary to discuss the other cases cited in detail, as they have no bearing upon the failure to obtain jurisdiction of the person of the petitioner.

The much-discussed and overruled case of *Roderigas v. East River Savings Institution* (63 N. Y. 460) is cited, wherein it was determined in a Surrogate's Court that the intestate was dead, when in fact the contrary was true. The same case was before this court in another phase (76 N. Y. 316), where it was held that the basis of the former decision was that the statute authorized the surrogate to decide upon evidence, and that it now appeared that there was nothing amounting to proof.

In *Scott v. McNeal* (154 U. S. 34) this case was expressly overruled as violating the fourteenth amendment of the Constitution of the United States, which ordains, among other things, “nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

The court said: “In *Roderigas v. East River Savings Institution* (63 N. Y. 460); in 1875, a bare majority of the

Court of Appeals of the State of New York decided that the payment of a deposit in a savings institution, to an administrator under letters of administration, issued in the lifetime of the depositor, was a good defense to an action by an administrator appointed after his death, upon the ground that the statutes of the State of New York made it the duty of the surrogate, when applied to for administration on the estate of any person, to try and determine the question whether he was living or dead, and, therefore, his determination of that question was conclusive. * * * And in a subsequent action between the same parties, in 1879, the same court unanimously reached a different conclusion, because evidence was produced that the surrogate never in fact considered the question of death, nor had any evidence thereof — thus making the validity of the letters of administration to depend, not upon the question whether the man was dead, but upon the question whether the surrogate thought so. (*Roderigas v. East River Savings Institution*, 76 N. Y. 316.) * * * No judgment of a court is due process of law if rendered without jurisdiction in the court, or without notice to the party. The words 'due process of law,' when applied to judicial proceedings, as was said by Mr. Justice FIELD, speaking for this court (*Pennoyer v. Neff*, 95 U. S. 714, 733), 'mean a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity there must be a tribunal competent by its constitution — that is, by the law of its creation — to pass upon the subject-matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State or his voluntary appearance.' " (See, also, *Lavin v. Emigrant Industrial Savings Bank*, 18 Blatch. 1, 24, U. S. Circuit Court, Southern District of New York.)

In the case at bar it was essential not only that the court should have jurisdiction of the subject-matter, but of the person of petitioner.

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

The Code of Civil Procedure (§ 2473) provides, in terms, that there is a presumption of jurisdiction where the necessary parties were duly cited or appeared, when a decree or other determination is drawn in question collaterally.

The argument of the respondent, in brief, is that it was sufficient if the court had jurisdiction of the subject-matter, to sustain the position that the petitioner must resort to the accounting proceeding if he desired to enforce his rights in the Surrogate's Court.

The respondent further argues that not only is the present proceeding unauthorized on behalf of the petitioner, but that he has an absolute right to intervene in the accounting proceedings, open the same on motion and litigate his rights therein.

We have already pointed out that the motion to open the proceedings is an appeal to the discretion of the court, and that the petitioner herein could not be remitted to an uncertain remedy in a proceeding which resulted in a decree that does not bind him.

It is further argued that assuming it to be an appeal to the discretion of the court, nevertheless, the Surrogate's Court did exercise its discretion, and decided that the petitioner might intervene in the accounting proceeding.

The record before us discloses no such decision, as the learned surrogate simply intimated in his oral opinion that it was incumbent upon the petitioner to come in under the accounting proceedings by petition or otherwise and ask that it be opened; there is no intimation as to what disposition the court would make of that motion.

We, however, regard this as wholly immaterial, as the decree in the accounting proceedings, for reasons already stated, is absolutely void as to this petitioner.

It is contended that the petitioner instead of instituting the present proceedings, might have filed a bill in equity, bringing in all the parties and securing such a judgment as justice dictates.

It is of no importance whether the new issue as to the peti-

tioner being a brother of the intestate is tried in this proceeding, or in the former accounting proceedings, or in a suit in equity, as the result must be the same in case he succeeds in establishing his claim, so far as the administrator is concerned.

It is argued that the Surrogate's Court would have no authority to render a decree compelling the distributees of the fund to make restitution of the same to the petitioner; nor could it vacate its former decree in the premises, having no equity powers.

We hold that the petitioner was at liberty to invoke one of two remedies; he could require the administrator to account in this proceeding, or he might have summoned him and all the parties in interest into a court of equity for a like purpose. The prior accounting proceedings in no way concern the petitioner, as he will be entitled, if he succeeds in establishing his identity as a brother of the intestate, to her entire personal estate after debts and expenses of administration are paid.

We express no opinion as to the limitations, if any, which restrain the Surrogate's Court in rendering a decree in this proceeding if the petitioner is successful. The latter has chosen his forum and must content himself with such relief as can be afforded him therein.

The administrator having entered and obeyed a decree of distribution that does not bind the petitioner cannot invoke it as a shield at this time. If he is subjected to loss by reason of this fact it is due wholly to his failure to avail himself of the protection which the law afforded him.

The suggestion that no question of law is presented by this appeal is disposed of by the exception to the surrogate's conclusions of law, to which reference has already been made.

The order of the Appellate Division, and the decree of the Surrogate's Court of Monroe county therein affirmed, should be respectively reversed, with costs in all the courts to petitioner to abide the event, payable out of the estate, and the case remitted to said Surrogate's Court to proceed in accordance with the views herein expressed.

O'BRIEN, J. (dissenting). The order from which this appeal is taken dismissed an application by the petitioner to the surrogate to compel an administrator to account after he had been discharged and after he had already distributed all the estate under and in obedience to an order or decree of the surrogate directing such distribution. The petitioner claims that the former decree directed distribution to the wrong parties and that he is, in fact, the sole next of kin of the deceased who was entitled to the estate. It is important to note at the outset that the order of the surrogate dismissing the application does not state whether it was dismissed for want of power to entertain the proceeding or in the exercise of discretion.

On the 24th of August, 1898, one Mary Killan died, intestate, in the city of Rochester, leaving personal property of the value of about fifteen hundred dollars. One Miles T. O'Reilly, a creditor of the deceased, petitioned for letters of administration upon her estate, and they were granted to him by the surrogate of Monroe county. More than a year thereafter the administrator petitioned for a settlement of his accounts and the surrogate issued a citation directed to the next of kin and heirs at law, creditors and persons interested in the estate of the deceased to attend a judicial settlement of the administrator's accounts on the 30th day of December, 1899. The citation was duly served by publication, and on the return day thereof there appeared five persons who claimed to be cousins of the deceased and entitled to the distributive share of her estate. The administrator denied their relationship, whereupon an issue of fact was formed and tried, in which the surrogate adjudged and decreed that they were in fact cousins of the deceased, and the only heirs at law and next of kin living. He ordered the administrator to make distribution accordingly, which he did, and having filed his receipts with the surrogate a decree was entered discharging the administrator from his trust. It will be seen that this proceeding involved a decision of the issue of fact as to what persons constituted the sole next of kin of the deceased. The five cousins alleged that they were the sole next of kin and the

administrator denied it. In determining the issue the surrogate decided that the five cousins were, in truth, the sole next of kin, and before he could reach that conclusion he had to determine that the deceased died leaving no parent, child, brother or sister, since the cousins could not be the sole next of kin if she had left any nearer relative. The surrogate had jurisdiction of the question to be decided. He had jurisdiction of the fund to be distributed. He had jurisdiction of the administrator and the five cousins; therefore, it would seem that his decree of distribution was made with perfect jurisdiction of the subject-matter and of the parties, and so long as that decree stands it is obviously a bar to this proceeding.

If, upon that hearing, the surrogate had found and adjudged that the deceased left a brother surviving, and that the present petitioner was that brother, and that as such he was the sole next of kin and entitled to have the estate distributed to him, no one, I think, can doubt that it would be a perfect judgment in his favor, available to him and good as against all the world until opened, reversed or set aside, although he was not a party; and for the plain reason that the court had power to make it, and if he had power to render a judgment in his favor he had the same power to render it against him and in favor of the five cousins, and the judgment has the same binding effect in the one case as in the other until vacated or reversed in some direct proceeding for that purpose.

About a year after the discharge of the administrator the petitioner, who signs his name as *Martin Killeen*, a different name from that of the deceased, and a resident of Ireland, filed a petition with the surrogate alleging that he was a brother of the intestate. His petition set forth the issuing of letters to the administrator, claimed that no account had been made and asked for a citation directing him to account. Thereupon a citation was issued directing the administrator to show cause why he should not render an account, and on the return day, January 23, 1901, the administrator filed an answer setting forth his accounting in the estate, the order

of distribution, compliance with that order, the filing of receipts from the distributees and a decree of judicial settlement and discharge; he also denied Killeen's relationship with the deceased. An issue of fact was thus joined between the petitioner and the administrator, and the former was bound to show that he was, as he claimed to be, the brother of the deceased. The petitioner subsequently made application to the surrogate for a commission to take testimony in Ireland to establish his relationship, and a hearing was then had on the whole question with respect to the petitioner's right to an accounting. The surrogate denied his application for a commission to take testimony and also his application for an independent accounting, on the ground, among others stated in his opinion, that the relief to which he was entitled, if any, was to open the decree already entered, on notice given to the persons affected thereby, and the Appellate Division unanimously affirmed the order of the surrogate. The petitioner was not cited by name, and the surrogate found he was not a party to the prior proceedings in the Surrogate's Court, under which the estate was distributed and the administrator discharged, and his claim is that he has an absolute right to institute an independent proceeding against the administrator for an accounting in the same manner as if no accounting had ever been had, and the question involved in this case is whether the former decree of discharge does not protect the administrator against this proceeding and remit the petitioner to an application to open the decree or some other remedy. The contention in behalf of the petitioner is, that the former decree of distribution was absolutely void as to him, and of no more effect with reference to this proceeding than if it had never been made. This seems to me to be the radical and fundamental error that pervades the whole argument in support of this appeal. It is a general and universal rule that, where general jurisdiction is given to the Surrogate's Court over such a subject, and that jurisdiction depends in a particular case upon facts which must be brought before the court for its determination upon

evidence, and where it is required to act upon such evidence, its decision upon the question of jurisdiction, as against all the world, is conclusive until reversed, revoked or vacated, so far as to protect its officers and all other innocent persons who acted upon the faith of it. It frequently happens that a surrogate makes an order or decree in which the wrong party is appointed, or administration is granted even in cases where the person alleged to be dead is still living, but as that court has jurisdiction to inquire with reference to all these facts, its orders and decrees have been held to be conclusive, even when infected with a radical error of fact, at least until revoked, vacated or set aside. (*Kelly v. West*, 80 N. Y. 139; *Roderigas v. East River Sav. Inst.*, 63 N. Y. 460; *Bolton v. Schriever*, 135 N. Y. 65; *Staples v. Fairchild*, 3 N. Y. 41; *Potter v. Ogden*, 136 N. Y. 384; *Porter v. Purdy*, 29 N. Y. 106; Redf. Law & Pr. of Sur. Ct. [5th ed.] 865.) In this case it is very clear that the surrogate had jurisdiction to decide as to what persons, as matter of fact, constituted the sole next of kin of the deceased and he did decide that the five cousins were, and involved in that decision is the finding that the deceased died leaving no parent, child, brother or sister, since the cousins could not be the sole next of kin if she died leaving any nearer relative. What the petitioner wants is an opportunity to retry that question. He claims that he has new evidence on the point which, if received, would show that the former finding of the surrogate in favor of the five cousins was an error of fact. He has a right to be heard and to give that evidence, but not in an independent proceeding which utterly ignores what had been decided before. The surrogate in deciding that the five cousins were the sole next of kin acted judicially, and his jurisdiction thus adjudged cannot be impeached collaterally. It can be attacked only directly in a proceeding for that purpose or by appeal. If it were otherwise and the petitioner were to succeed in his application for an independent accounting and establish his relationship as a brother of the deceased the effect would be to have two decrees of distribution in one estate to entirely

N. Y. Rep.]

Dissenting opinion, per O'BRIEN, J.

different parties made by the same court. In this case we would have one decree directing distribution to be made to the five cousins and another decree made after the administrator had been discharged directing distribution to the petitioner. Moreover, if this proceeding can be entertained the administrator, although he has accounted and distributed the fund under the order of the surrogate, must again account and pay over again to the new claimant. But that is not all. If, after responding to that demand, another party should appear claiming that he was the husband of the deceased and as such entitled to the personal estate in preference to all other relatives and the claim should be entertained and established in an independent proceeding, the administrator would have to respond for a third time for the estate that came to his hands. Thus, the administrator would be compelled to litigate during his life with genuine or spurious claimants for an estate that he had once distributed under an order of the court that unquestionably had jurisdiction and whose decrees he was bound to obey.

The well-considered case of *Exton v. Zule* (14 N. J. Eq. 501) is identical in its facts with this case. There, as in this case, a new claimant without notice claimed that distribution of the estate was made to the wrong parties in disregard of his rights without notice of a hearing to him, and the court very properly said: "It may be true that neither the first nor the second set of claimants are the real next of kin of the intestate, and that the parties actually entitled are yet undiscovered. But this will not authorize the Orphan's Court, upon every new ray of light that may be received, to set aside their own decree lawfully made and compel the administrator to pay the estate over again to every new claimant. It is the duty of the court before the decree of distribution is made to see that the case is clearly proved. If there be reasonable room for doubt as to the rights of the parties the decree should be denied. When once made and not appealed from, it operates as an effectual shield to the administrator and protects him against all other claimants. If a party entitled to a

distributive share is by the decree deprived of his rights without actual notice and without a hearing, his only remedy is against the distributees who have received the estate." (p. 514.)

I think this proceeding was not authorized by any law of this state and that the decisions of the courts below to that effect are clearly right. It is a case where the petitioner has mistaken his remedy. He has a right to open and intervene in the proceeding that resulted in a decree of distribution and the discharge of the administrator. There are other remedies to which the claimant could resort. By the provisions of the Code, section 2482, authority is conferred upon the surrogate "to open, vacate, modify or set aside, or to enter as of a former time a decree or order of his court * * * for newly-discovered evidence, clerical error or other sufficient cause." The petitioner could have invoked, and was bound to invoke, this power if he desired to be heard with respect to his claim. There is but one answer to this proposition, and that is that since it was in the discretion of the surrogate to grant or refuse such an application the claimant was not bound to resort to it. While some of the powers conferred upon the surrogate by this section undoubtedly are discretionary, the petitioner had the absolute right to intervene, and the surrogate had no discretion to refuse his application, since he claimed to own the estate and was deprived of his property by a decree to which he was not a party. It is quite conceivable that under our probate laws administration may be taken out upon the estate of a living person and his property distributed under a decree, but if that person, after the decree was entered, appeared before the Surrogate's Court with proof that he was the person alleged to be dead and whose property was distributed, demanding that the decree be opened or set aside, he would be entitled to a hearing and the relief as an absolute right. Any other view would lead to consequences most unjust and absurd. There are various analogous provisions of law on this subject which show that a party situated as this claimant is, or claims to be, has an absolute right to

N. Y. Rep.]

Dissenting opinion, per O'BRIEN, J.

intervene. By section 445 of the Code, where service is made by publication and there is no appearance, it is provided that a party *must* be admitted to defend if he applies within seven years after the filing of the judgment roll where there has been no personal service upon him of a written notice of the entry of the judgment. The right secured by that section is not subject to discretion. (*People v. Albany & V. R. R. Co.*, 77 N. Y. 232; *Earle v. Hart*, 20 Hun, 75.) But even if it be true that the right to open the former decree and to be heard was subject to the discretion of the surrogate, that question has no application to this appeal, since the discretion was exercised in favor of the claimant and he was permitted to come in and try the question as a party to the first accounting; therefore, so far as this claimant is concerned, it is of no consequence whether the right which was conceded to him at the hearing was absolute or discretionary.

The surrogate, on the accounting, had an issue of fact to try, and that was whether the five cousins of the deceased to whom the estate was distributed were, in fact, the sole next of kin of the deceased. He found that they were, and, therefore, he necessarily found that the claimant is not her brother. Now, the fact may have been determined erroneously and against the truth, but it cannot be denied that the surrogate had complete jurisdiction of the question, and if there was any error at all in his decision it was an error of fact and the claimant had and still has an absolute right to appeal from that decision of the surrogate and from the decree of distribution either for an error of law or fact or both, and on the hearing of that appeal he has an absolute right to give proof to show that he is the sole next of kin and that the five cousins are not. (Code Civ. Pro. §§ 2568, 2569, 2576, 2586.) With these remedies open to the petitioner it is very difficult for me to see that the surrogate committed an error of law reviewable in this court for refusing to entertain this proceeding. The Supreme Court has concurrent jurisdiction of matters of accounting by administrators and the petitioner had a right to bring an action for that purpose. If that court had

ordered distribution and discharged the administrator, as the surrogate did, no one, I think, would claim that the decree was void, or that the claimant, though not served, had any other remedy than to apply to open the decree and come in to defend and prove his claim. Nor could it be asserted that in such a case the right to defend might be refused in the exercise of discretion. There cannot be, in this respect, one law for the Supreme Court and another and different law for the Surrogate's Court. If the claimant could only apply to come in in case the accounting was had in the Supreme Court, he has no other remedy under the same circumstances where the accounting was in the Surrogate's Court, and certainly not the remedy sought in this proceeding.

The surrogate found that he issued and served a citation by publication on the creditors, heirs at law and next of kin of the deceased. At the request of the claimant he found that he was not cited or a party to the accounting. All that can be meant by this finding is a conclusion on the part of the surrogate that, since his name was not mentioned in the citation and since it was not addressed to him, he, therefore, was not a party and was not cited. The whole fabric of error in this case is built upon this slender superstructure. I will not now stop to inquire whether the surrogate was bound to pass upon requests presented to him. I had supposed that the Code had done away with that practice. It certainly has in some cases. (§ 1022.) But I do not regard the finding, if it can be called one, of the slightest consequence. It is universally held and understood that orders and decrees in probate courts are not made between party and party, but are in the nature of judgments *in rem* that are good against all the world, even against persons who are not cited. All that is necessary is that the court obtain jurisdiction, and it is conceded that the decree of distribution in this case was binding on the administrator, and, therefore, made with jurisdiction. Such judgments are not *in personam*, but generally adjudge the status of a person or a thing. In this case the decree adjudged that the claimant was not the brother of the deceased,

N. Y. Rep.]

Dissenting opinion, per O'BRIEN, J.

and, hence, it determined his status or relationship to the deceased. It likewise determined the disposition to be made of the fund which was the thing or *res* over which the court had jurisdiction. When the surrogate got jurisdiction of the question as to what persons constituted the next of kin, the fact that the present claimant was not a party is wholly immaterial. The judgment is good as against all the world until it is opened, vacated or reversed. (*Eaton v. Zule*, 14 N. J. Eq. 501; *Clemens v. Clemens*, 37 N. Y. 73; Herman on Estoppel and Res Adjudicata, §§ 45-48, 290-297, 326-330; Black on Judgments, § 635; Freeman on Judgments, § 319b; 2 Smith Lead. Cases, 812, 813.) Any one who will read the case first above cited will find it difficult to distinguish it from this. It covers the whole ground involved here and even more.

It may be profitable to stop and inquire for a moment as to the power of the surrogate in case it is held that this proceeding is authorized by any law. Of course, the proceeding is utterly futile unless the surrogate has power in an independent and collateral application, such as this is, to disregard or set aside his former decree which the administrator obeyed and was then discharged from his trust and to make a new decree that the administrator pay to this claimant the money which he paid to others under a decree where there was perfect jurisdiction. Can he, in this proceeding, set aside his former decree and order the administrator who has been discharged to account and pay again simply because that decree is claimed to be affected by an error of fact, for that is all that can be alleged against it? That would plainly mean that he may review his own judgments and correct his own errors of law and fact, not upon any appeal to him for that purpose, but in another and collateral proceeding. The general powers of a court of equity do not belong to a Surrogate's Court and that court has no power in this or any other independent proceeding to set aside or disregard its own decree of distribution and the order discharging the administrator, even though either or both orders were affected by fraud. (*Matter of*

Dissenting opinion, per O'BRIEN, J.

[Vol. 172.]

Randall, 152 N. Y. 508; *Sanders v. Soutter*, 126 N. Y. 193.) It would be a novel proceeding for a surrogate, on the petitioner's application, to enter upon the trial of a question of fact whether he or the five cousins, who have received the money, are the sole next of kin of the deceased. That very question he tried and decided once before, and his judgment remains in full force and is a complete protection to the administrator, as this court in principle has just decided. (*Platt v. N. Y. & S. B. Ry. Co.*, 170 N. Y. 451.) If the claimant has any case at all it is clear that he has mistaken his remedy and has adopted a method of procedure that cannot be tolerated in the administration of estates, and this would be so even though his right to intervene is discretionary as his counsel claims, since the discretion, if it exists under the law, was exercised in his favor by the surrogate and he was permitted to come into the original proceeding. We have seen that at least three distinct remedies were open to the claimant, if he is in fact entitled to the estate of the deceased as her sole next of kin. Those remedies were: *First*, a motion to open the former decree. *Secondly*, an appeal from that decree; and *thirdly*, to invoke the jurisdiction of a court of equity in regard to the whole controversy by an action in which the five distributees could be made parties and could be decreed to restore the fund distributed to them if the claim of the petitioner should be established. But it seems that, for some reason, no remedy will answer the purposes of the claimant unless he is permitted to entertain this independent proceeding which ignores all that has been done as absolutely void, although the administrator has been discharged from his trust after having distributed the estate that came to his hands in accordance with the decree of a court of competent jurisdiction. No one questions the proposition that the administrator was bound to obey that decree and it is a universal rule that a trustee who acts in obedience to a decree or judgment of a court of competent jurisdiction is protected from any future personal attacks by that decree. In this case the decree of distribution is a shield and protection to the administrator and to the five

N. Y. Rep.]

Dissenting opinion, per O'BRIEN, J.

distributees until it is vacated or set aside, and if that is so this petitioner has no right to attack the administrator in this independent and collateral proceeding. The administrator being bound to obey the decree it would be quite absurd to hold that it is no protection to him although upon its face it is regular, but that he must respond to new claimants from time to time as they may appear.

Assuming all the facts stated in the claimant's petition to be true, he can accomplish nothing in this proceeding. He must first get rid of the order discharging the administrator and the decree directing distribution. It is not enough to say that he was not a party to this proceeding so long as the court had jurisdiction over the fund, the administrator and the distributees. The court could have made a complete and binding decree in the claimant's absence, since the very question before it was with respect to the persons constituting the next of kin of the deceased. These orders did not conclude the petitioner in the sense that he may not be heard in the proper court, in the proper proceeding, but they protect the administrator and the distributees until reversed or vacated. It is very obvious that the petitioner must invoke the broad powers of a court possessing general equity jurisdiction in order that he may compel the cousins, who are the distributees of the fund, to restore it to him through the coercive powers of that court. Any proceeding to which they are not parties cannot result in any relief to the claimant. There are two things which the petitioner must accomplish before he can recover the fund representing the estate of the deceased: (1) He must have the decree of distribution set aside or vacated and he must have the decree discharging the administrator set aside or vacated. (2) He must procure a decree requiring the five cousins to make restitution of a fund paid to them under an error of fact involved in the finding of the surrogate that they, instead of the claimant, were the sole next of kin. A Surrogate's Court has no power to do any of these things since they belong to, and are part of, the functions of a court with general equity jurisdiction.

I cannot concur in the judgment about to be rendered in this case for reasons that are very obvious. I cannot believe that the decree of distribution made by the surrogate and obeyed by the administrator is, as it is claimed to be, void as against this claimant or any one else. I cannot believe that it is legally possible to have two or more conflicting decrees of distribution all in force at the same time, one distributing the estate to the five cousins and the other to this claimant. I cannot believe that an administrator who has distributed an estate that has come to his hands in exact accordance with the decree of a competent court and has been discharged from his trust can be attacked years afterwards by a new claimant, at least so long as the former decree and discharge are in full force. In other words, I cannot believe that a trustee and the sureties upon his bond can be held personally liable for the estate that came to his hands and which he has distributed and disposed of under the orders of the court so long as that decree is in full force. To state the proposition in another way: I do not believe that a trustee or his sureties can be held personally liable for obeying the judgment of the court which he was bound to obey. Cases like this are liable to arise frequently, and such cases must, in the nature of things, have been presented to the courts before, but I doubt if it was ever held by any court in the civilized world that after an administrator had distributed the estate in his hands exactly as the court directed him that he afterwards could be held personally liable upon the application of a new claimant. If the laws of this state authorize or sanction any such procedure the situation would go far to justify some of the grotesque caricatures that novelists and writers of fiction have drawn to describe, or rather distort, those endless and expensive controversies in the courts concerning the distribution of the estates of deceased persons.

It is proper to observe before closing the discussion that this drastic law is to be made in a case over which this court has no jurisdiction. I have already called attention to the circumstance that there was no question before the surrogate

in this application except an issue of fact formed by the allegation in the claimant's petition and the denial of this allegation by the administrator. The issue thus presented called for an inquiry as to whether this claimant was in fact the brother of the deceased. The decision of the Appellate Division is unanimous and nothing can be reviewed on this appeal except a pure question of law raised by a proper exception. There was no trial for the plain reason that the claimant was not prepared for trial and so the surrogate dismissed the proceeding. The only exception in the case is one filed after the decree was entered on the dismissal of the petition. If the surrogate could have dismissed the proceeding in the exercise of discretion then it is quite clear that the order is not reviewable in this court, since upon its face there is no statement that it was made for want of power. The claimant asked the court for a commission to examine witnesses in Ireland to prove the allegations in his petition and the surrogate refused his application in that respect. A ruling or order of a surrogate granting or refusing an application for a commission to examine witnesses in a foreign country is not reviewable in this court. The right to produce the testimony of witnesses in such a proceeding, otherwise than in open court, subject to cross-examination, is not an absolute one, but is subject to the sound discretion of the court. (*Merchants' National Bank v. Sheehan*, 101 N. Y. 176.) This court cannot say that the surrogate decided anything amounting to legal error. No one has been able to point out any question of law which the surrogate decided erroneously. If the learned counsel for the claimant desired to bring the case to this court he should have made a formal offer before the surrogate to prove the facts stated in the petition and should have excepted to the ruling in case the surrogate refused to hear such proof. I am far from suggesting that such an exception would be good, since for reasons already stated the whole proceeding was misconceived, but nothing less than that could give him any standing in this court. When a case is regularly called in the court in which it is pending and the plaintiff is not prepared

Dissenting opinion, per HAIGHT, J.

[Vol. 172.]

to proceed to try the issue of fact involved, and neither gives proof nor makes offer of proof otherwise than by an application for a commission to a foreign country of the allegations of fact upon which he relies, the dismissal of his complaint or petition is not a legal error which this court can review. That is the only assignment of error which this appeal presents. It matters not what reasons the surrogate gave for his action. This court is not concerned with the reasons of the trial courts but with their judgments and orders. It matters not that the surrogate stated in his opinion that this proceeding was unauthorized. The fact still remains that he was not bound to wait until the claimant had gathered his testimony by commission in a foreign country. Moreover, one of the reasons given by the surrogate for dismissing the proceeding was that the claimant had not cited the five cousins who had received the estate under the former decree, so we have before us an order made by a surrogate which he had the power to make in the exercise of discretion, and there is no statement in the order that it was made for want of power to entertain the proceeding. It has been held a great many times in this court that such orders are not reviewable. As the surrogate was not bound to wait for the claimant to gather his proofs by commission in a foreign country, and as the claimant had not brought before the court the parties who had received the estate under the decree of the court, the surrogate had the right to dismiss the proceeding as he did, and since the body of the order contains no statement that he did not dismiss in the exercise of discretion but for want of power, this court has no jurisdiction as no question of law is presented. (*Tilton v. Beecher*, 59 N. Y. 176; *Snebley v. Conner*, 78 N. Y. 218; *Salmon v. Gedney*, 75 N. Y. 481; *Tolman v. Syr., B. & N. Y. R. R. Co.*, 92 N. Y. 353.)

For these reasons I am in favor of affirming the order or dismissing the appeal.

HAIGHT, J. (dissenting). I concur with O'BRIEN, J., for affirmance. I think the Surrogate's Court acquired jurisdic-

N. Y. Rep.]

Statement of case.

tion of the proceedings for the judicial settlement of the accounts of the administrator and that the decree made therein is binding upon the administrator and all the persons cited, served and appearing upon the hearing; and that, under the provisions of the Code, but one final decree of distribution of the funds in the hands of the administrator is contemplated or provided for. I am further of the opinion that the surrogate adopted the correct practice in holding that the petitioner, not having been made a party to the proceeding and not having appeared therein, has the right, upon his application, to have the decree opened and then heard upon his claim to be the next of kin and entitled to share in the distribution of the estate.

PARKER, Ch. J., VANN and CULLEN, JJ., concur with BARTLETT, J.; O'BRIEN and HAIGHT, JJ., read dissenting opinions; WERNER, J., concurs with O'BRIEN, J.

Order reversed, etc.

In the Matter of the Appraisal, under the Transfer Tax Act, of the Estate of GEORGE JONES, Deceased.

172 575
78 AD 615

THE COMPTROLLER OF THE CITY OF NEW YORK et al., Appellants; GILBERT E. JONES et al., as Executors, etc., et al., Respondents.

1. JOINT STOCK ASSOCIATIONS — SHARES ARE PERSONAL PROPERTY AND TAXABLE AS SUCH. The shares of a joint stock association constitute personal property and are taxable as such, irrespective of the character of the property represented thereby, whether real or personal.

2. INTEREST OF DECEASED SHAREHOLDER SUBJECT TO TRANSFER TAX. The interest of a deceased shareholder in the realty of a joint stock association is personal property, and under chapter 215 of the Laws of 1891 a bequest thereof is subject to the transfer tax.

3. METHOD OF ESTABLISHING VALUE OF SHARES. Where the shares are not listed upon the stock exchange or sold in the open market, the value of the realty may be properly considered upon an appraisal in order that their value may be established.

4. AUTHORITIES COLLATED. The distinction between joint stock associations and corporations pointed out and authorities relating thereto discussed. *Matter of Jones*, 69 App. Div. 237, reversed.

(Argued November 10, 1902; decided December 9, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered February 14, 1902, which modified and affirmed as modified an order of the New York County Surrogate's Court imposing a transfer tax upon the estate of George Jones, deceased.

The facts, so far as material, are stated in the opinion.

John R. Dos Passos and *Edmund F. Harding* for appellants. The shares are personal property. (*A. E. Co. v. Ohio*, 166 U. S. 185; *People ex rel. v. Roberts*, 4 App. Div. 334; *Matter of Brandreth*, 59 N. Y. Supp. 1092; *Simpson v. J. C. C. Co.*, 165 N. Y. 199; *Waterbury v. M. U. E. Co.*, 50 Barb. 150; *Rice v. Rockefeller*, 134 N. Y. 187; *Kent v. Q. M. Co.*, 78 N. Y. 179; *Arnold v. Ruggles*, 1 R. I. 165; *Germain v. L. S. & M. S. R. Co.*, 91 N. Y. 492; *Matter of Bronson*, 150 N. Y. 8.) The contention that a joint stock association is not an artificial person endowed by law with a perpetual succession, is unsustainable. (Const. of N. Y. art. 8, § 3; *Sandford v. Supervisors*, 15 How. Pr. 172; *People ex rel. v. Wemple*, 117 N. Y. 147; *Bray v. Farwell*, 81 N. Y. 600; *People ex rel. v. Coleman*, 133 N. Y. 282; *Waterbury v. M. U. E. Co.*, 50 Barb. 160.) The unlimited liability upon the holder does not make his share any the less a proprietary entity in itself. It has not that effect in unlimited liability corporations. (*People ex rel. v. Wemple*, 117 N. Y. 146; Black. Comm. 475; Taylor on Corp. [5th ed.] §§ 54-56; *L. Ins. Co. v. Massachusetts*, 10 Wall. 566.)

G. B. Townsend for respondents. "The New York Times" was a partnership both with reference to its shareholders and its relations with third parties. (17 Am. & Eng. Ency. of Law [2d ed.], 636; *Schwartz v. Wechler*, 2 Misc. Rep. 67; *Witherhead v. Allen*, 4 Abb. Ct. App. Dec. 628; *Brooks v. Dinsmore*, 15 Daly, 428; *People ex rel. v. Coleman*, 133 N. Y. 279.) Real estate belonging to a partnership retains the attributes of and is treated as real estate, and as such is not taxable under the Transfer Tax Act. (*Collumb v.*

N. Y. Rep.] Opinion of the Court; per BARTLETT, J.

Read, 24 N. Y. 505; *Van Brunt v. Applegate*, 44 N. Y. 544; *Fairchild v. Fairchild*, 64 N. Y. 471; *Tarbel v. Bradley*, 7 Abb. [N. C.] 273; *Darrow v. Calkins*, 6 App. Div. 28; *Smith v. Jackson*, 2 Edw. Ch. 28; *Buchan v. Sumner*, 2 Barb. Ch. 163; Gerard on Tit. [2d ed.] 318; *Matter of Swift*, 137 N. Y. 77; *Matter of Sutton*, 3 App. Div. 208.) Any doubt as to the legality of taxing real estate in this matter should be resolved in favor of the respondents. (*Matter of Swift*, 137 N. Y. 77; *Matter of Fayerweather*, 143 N. Y. 114; *Matter of Euston*, 113 N. Y. 174; *Matter of Harbeck*, 161 N. Y. 217; *Matter of Sutton*, 3 App. Div. 208.)

BARTLETT, J. The single question involved in this appeal is one of law upon undisputed facts.

The late George Jones was a member of a joint stock association known as "The New York Times." The property of this association was represented by the issue of a hundred shares of stock, of which the deceased owned forty-six. This association was formed in January, 1872, its articles being executed by seven associates, and provided in detail for the management of the business; the eighth subdivision thereof reads as follows: "All the property, real and personal, and all the goods and chattels, choses and rights in action, and credits of every name and nature, with the evidence thereof, including the good will of its business of the association heretofore existing, known as 'The New York Times Establishment,' are put in by the undersigned, who are the owners thereof and constitute the value of the shares of the association."

The ninth subdivision reads: "The shares of the association shall represent all the rights and property mentioned in the foregoing article, together with all said property, goods and chattels, rights and credits, as shall from time to time be required, and shall always be divided into one hundred equal shares."

The articles further provided that each of the associates had the power to sell his shares subject to certain conditions

not important to be considered at this time. Also that the title to the real estate should vest in the president of the association and be held by him for its use and benefit, subject to the control and disposition of the board of directors, who were clothed with ample powers to conduct the business.

Mr. Jones died on the 12th of August, 1891, leaving a last will and testament, which was duly proved. Certain provisions of this will were read in evidence and disclose the fact that the testator, in disposing of his interests in the association known as "The New York Times," divided it among his legatees, by giving to each a certain number of shares of the stock held by him. He bequeathed some of these shares absolutely and created separate trusts as to certain other shares. It thus appears that the associates, constituting this joint stock association, treated their property, real and personal, as represented by shares of stock, and Mr. Jones in his will saw fit to distribute his interest by adopting the same mode of representation.

It was claimed by the comptroller that these shares were personal property and taxable as shares of stock in an ordinary corporation; the executors contended that as the joint stock association owned this realty, the interest therein of the shareholder was realty also, and as it passed under his will in the direct line was exempt, the statute taxing transfers of realty only when passing to collaterals or strangers. (Laws of 1891, chap. 215.)

The views of the comptroller were adopted by the appraiser and by both surrogates of New York county, but the Appellate Division reversed with a divided court.

The history of joint stock associations both in England and this country is interesting.

Mr. Lindley, in his *Law of Companies* (fifth edition), at page 2, says: "When unincorporated companies, with a joint stock divided into numerous transferable shares, began to assume importance and to force themselves upon the attention of the legislative and judicial departments of the state, the reception they met with was by no means encouraging. Owing to the

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

then established rules relating to parties to actions at law and suits in equity, a joint stock company could not practically sue its own debtors, nor could disputes between its members be readily, if at all, adjusted. At the same time the doctrine that each member was answerable for the whole of the debts of the company was studiously promulgated and rigorously enforced."

The learned author discusses at length the growth of joint stock associations in England from an early time until the present day. He has, however, summed up the situation in the quotation already made, to the effect that with all the rights and powers conferred upon them, in the face of vigorous opposition, the doctrine of individual liability has been maintained.

In *People ex rel. Winchester v. Coleman* (133 N. Y. 279) Judge FINCH pointed out the many respects in which joint stock associations resemble corporations, but emphasized the fact that the one derives its existence from the contract of individuals, the other from the sovereignty of the state. He said: "The two are alike but not the same. More or less they crowd upon and overlap each other, but without losing their identity, and so, while we cannot say that a joint stock company is a corporation, we can say as we did say in *Van Aernam v. Bleistein* (102 N. Y. 360), that a joint stock company is a partnership with some of the powers of a corporation."

This quotation states in a brief manner the law relating to these associations as it exists in this state.

A joint stock company has never appealed to the sovereignty of the state for the right to exist, but by articles of association, which take the place of the charter of a corporation, the associates have been content to do business subject to the individual liabilities of partners.

In 1854 (Chap. 245) the legislature made it lawful for such associations to provide by their articles that the death of any stockholder, or the assignment of his stock, should not work a dissolution, but they should continue as before, and could

only be wound up by the judgment of a court. This law continued in force until the enactment of the "Joint Stock Association Law," passed in 1894, when it was repealed. (R. S. [Banks' 9th ed.] vol. 2, p. 1471.)

The Code of Civil Procedure has also provided for actions by or against an unincorporated association, preserving in part previous legislation and adding thereto new and liberal features. (§§ 1919 to 1924, both inclusive.)

Mr. Beach, in his work on Private Corporations (Vol. 1, § 167), in speaking of joint stock associations, says: "The powers conferred upon them by these enactments are such that for many purposes they are held to be corporations, even though they have nowhere been designated as such, and though the statutes relating to joint stock companies did not so designate them, or have expressly declared that they shall not be so considered. But with respect to the personal liability of members to creditors of the company they are still subject to the common-law rule applicable to partnerships."

The principal feature of the joint stock association is the right of perpetual succession. In this respect it is like a corporation, and enjoys all the advantages flowing from such a privilege.

It has frequently been held in this state that where a tax has been imposed upon all moneyed or stock associations it could not be collected from a joint stock association, for the reason that technically it could not be regarded as a corporation. (*People ex rel. Winchester v. Coleman*, 133 N. Y. 279; reported below, 37 N. Y. State Reporter, 120.)

In these cases the question was whether a joint stock association was taxable upon its capital under the provisions of the Revised Statutes (1 R. S. 414, § 1) subjecting "all moneyed or stock corporations deriving an income or profit from their capital or otherwise" to such a tax.

The opinions of Mr. Justice BARRETT at Special Term, Mr. Justice VAN BRUNT at General Term and Judge FINCH in this court all considered the question whether a joint stock association was a corporation, and whether the acts creating for it

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

certain privileges intended to confer a corporate franchise. It was held that while a joint stock association possessed certain corporate powers, nevertheless, it was not a corporation within the meaning of the statute to which reference has been made.

The fact that a joint stock association is not in legal contemplation a corporation, and not liable to taxation under acts seeking to reach corporations, in no way militates against the position assumed by the comptroller in this case. It is competent for private individuals to create a joint stock association, issue shares of stock, and in that form dispose of property by last will and testament. The associates by contract have created the same situation as to shares of stock that a corporation secures by charter.

In the case at bar the appraiser fixed the value of the interest of the estate of the personal property of "The New York Times" at \$15,640.00, the real estate at \$575,000.00, and the good will of the newspaper, less the existing debts, at \$184,000.00.

It is contended on behalf of the executors that this large amount of real estate, which is of greater value than appraised, is not subject to the tax, for the reason that it would descend to the testator's children and was not taxable under the Transfer Tax Law in force at the time of testator's death. The fact is that at the time of Mr. Jones' death the title to the real estate of "The New York Times" was vested in its president for the benefit of the association, and this situation was not changed by that event.

It is not possible that the real estate of "The New York Times" could, after Mr. Jones' death, remain as theretofore, the property of the association and used for its business purposes and still be regarded, so far as testator's interest was concerned, real estate passing to his children. It was neither so in fact nor in law.

The question to be determined at this time is not whether joint stock associations are corporations in the full meaning of the latter word, but rather what is the nature of the shares of

stock that joint stock associations are permitted to issue and sell in the open market.

The contention of the respondent and of the prevailing opinion below is that "The New York Times" being a joint stock association was a partnership both with reference to its shareholders and in its relations with third parties.

At this late day, and having regard to the remarkable development of joint stock associations both in England and this country, it is not possible to strictly apply the law of partnership to the manner in which they are to hold and dispose of real estate. The fact that the associates rest under the common-law liability of partners does not affect the question we are considering.

As to the nature of the shares of stock issued by a joint stock association, the same general principles of law are to be invoked that apply to a corporation.

This court in *Weaver v. Barden* (49 N. Y. 286) held that the capital stock of an incorporated company is personal property.

The Supreme Court of Rhode Island in *Arnold v. Rugles* (1 R. I. 165, 167, 168), in considering the nature of a share of stock, said: "Is a share, then, thus made up, to be deemed real estate, or as necessarily partaking of the realty? A share must pass one way or the other, as an entire thing. It cannot be resolved into the elements, of which the assets of the corporation consist, and a part pass to the heir and a part to the executor without destroying it and with it the whole concern. It is an entirety and must be either real or personal. And which is it? It will not do to make the property of the corporation a criterion, for the property of almost every corporation is more or less mixed. We must make the share itself, those rights which constitute its beneficial interest, the criterion. Its right then to receive a dividend of the whole concern, whether real or personal, is the interest by which it is to be judged."

This is a clear and satisfactory statement of the attributes of a share of stock.

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

It would be incongruous and impossible, in conducting the affairs of a joint stock association, in view of the fact that it is allowed to issue stock, to hold, as the respondent contends, that notwithstanding the articles of association provide that neither the death nor the transfer of the interests of any shareholder shall work a dissolution of the association, or any interruption of its business, that, nevertheless, on the death of an associate his interest in the real estate of the association must be deemed to descend to his heirs at law and his interest in the personalty to pass under the Statute of Distribution.

The distinction between the property of a corporation represented by its capital stock and the property of the stockholders represented by their shares is discussed by the Supreme Court of the United States in a recent case. (*Cleveland Trust Co. v. Lander*, 184 U. S. 111.) The plaintiff in error, the Cleveland Trust Company, had a capital stock of five hundred thousand dollars, divided into five thousand shares of a hundred dollars each, all of which were paid up and the certificates were owned by a large number of persons in Ohio and elsewhere. The plaintiff was the owner of one hundred and seventy-four bonds of the United States of the denomination of a thousand dollars each, valued at the sum of \$213,274.81, and claimed in its return in a tax proceeding the right to deduct the bonds from the par value of its stock. The Supreme Court of the state of Ohio sustained the decision of the Court of Common Pleas overruling this claim of the plaintiff, and an appeal was taken to the Supreme Court of the United States.

Mr. Justice McKENNA, in delivering the opinion of the court, said: "The plaintiff concedes the distinction between the property of the corporation, represented by its capital stock, and the property of the stockholders, represented by their shares, and bases an argument upon that distinction, and yet excludes from consideration as immaterial to the question at issue the laws of Congress governing the taxation of the shares. * * * In other words, the contention is that the tax on the shares being equivalent to the tax on the property

of the trust company there must be deducted from the value of the shares that portion of the capital of the company invested in the United States bonds. The answer to the contention is obvious and may be brief. The contention destroys the separate individuality recognized as we have seen by this court of the trust company and its shareholders, and seeks to nullify one provision of the Revised Statutes of the United States (§ 5219) by another (§ 3701), between which there is no want of harmony. And what the Constitution of the State of Ohio requires and what the statutes of the State require as to taxation must be left to be decided by the Supreme Court of the State, and whether that court has decided logically or illogically that a tax authorized by the laws of the United States on the shares of the company satisfies the Constitution of the State as a tax on the corporation is not open to our review or objection. The manner of taxation being regulated under the statutes of the United States, its effect cannot be complained of in the Federal tribunals. We do not mean to be understood as implying that the plaintiff's view of the Constitution of the State or of the laws of the State is correct. The inquiry is not necessary. Accepting such view as correct, plaintiff shows no right under the Constitution or the laws of the United States which has been violated."

The principle that the stock of a joint stock association is similar in its nature to that of a corporation has been recognized in a number of cases. (*Waterbury v. Merchants' Union Express Co.*, 50 Barb. 157, 161; *Rice v. Rockefeller*, 134 N. Y. 174, 187; *People ex rel. Platt v. Wemple*, 117 N. Y. 146, 149.)

As to the nature of the stock of corporations it has been frequently held that not only is stock personal property, but that it is so no matter what the character of the corporate property may be. (*Kent v. Quick Silver Mining Co.*, 78 N. Y. 179; *Weaver v. Barden*, 49 N. Y. 286; *Jermain v. Lake Shore & M. S. Ry. Co.*, 91 N. Y. 492; *Bradley v. Holdsworth*, 3 M. & W. 422; *Cook on Stockholders*, § 12.)

In *Matter of Bronson* (150 N. Y. at page 8) this court

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

held that shares of stock actually represented undivided interests in a corporate enterprise; the corporation holding the legal title for the benefit of stockholders.

The Statutory Construction Law (Laws of 1892, chap. 677, § 4), in defining personal property, says: "The term 'personal property' includes chattels, money, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien or incumbrance in, to or upon property, or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated, wholly or in part, and everything, except real property, which may be the subject of ownership."

This very exhaustive definition covers certificates of stock.

The Code of Civil Procedure (§ 647) provides, in substance, that the rights or shares which a defendant has in the stock of an association or corporation, together with the interests and profits thereon, may be levied upon by attachment, thus recognizing that the stock of an association, as well as that of a corporation, is deemed personal property.

The question we are now considering does not seem to have been directly passed upon by this court, but has been in other jurisdictions.

In England the case of *Myers v. Perigal* (21 L. J. C. L. Court of Common Pleas, 217) holds that the bequest of the proceeds of shares in a joint stock banking company did not come within the "Statute of Mortmain." (4 Geo. II, chap. 36; 9 Geo. II, chap. 36.)

In Pennsylvania we are cited by the appellants to the following cases, the first of which involved the law of joint stock associations, and the other of limited partnership, which closely resembles joint stock associations. (*In re Oliver Estate*, Pennsylvania Supreme Court, 9 L. R. A. 421; *Re Small Estate*, 151 Penn. St. 1.)

We are of opinion, on principle and authority, that the shares of a joint stock association should be treated as personal property and taxable as such. The difference between a

corporation and a joint stock association, in view of the many corporate powers bestowed upon the latter, is more in degree than kind.

The policy of the legislature in creating corporations is to continue to a certain extent the common-law liability of partners or joint debtors under which the stockholders would rest if unincorporated and engaged in a joint venture or partnership. This liability is primary and not statutory, and rests upon the directors and stockholders alike. The legislature says in effect to all the members of the corporation you shall enjoy certain corporate powers, but as to creditors you remain liable as partners at common law, subject to such limitations as we have placed upon that liability.

In *Corning v. McCullough* (1 N. Y. 47) it was held that where the charter of an incorporated company provides that the stockholders shall be liable for the debts, and that the creditor may, after judgment obtained against the corporation and execution returned unsatisfied, sue any stockholders and recover his demands, such stockholders are liable in an original and primary sense, like partners or members of an unincorporated association, and their liability is not created by the statute of incorporation. In other words, the directors and stockholders of a corporation rest under a modified common-law liability, while the associates in a joint stock association rest under the full common-law liability.

Assuming that the shares of "The New York Times" are personal property and taxable as such under the Transfer Act existing at the time Mr. Jones died, the remaining question is whether the appraiser was authorized to consider the value of the real estate in ascertaining the value of the shares. It is clear from the figures resulting from the appraisal that the real estate constituted the greater part of the assets of the association. These shares were not listed upon the Stock Exchange, or sold in the open market, and the only way to get at their value was to ascertain the property they represented. (*People ex rel. Union T. Co. v. Coleman*, 126 N. Y. 433.)

N. Y. Rep.]

Statement of case.

The order appealed from should be reversed, and the order of the surrogate affirmed, with costs to the appellants in all the courts.

PARKER, Ch. J., O'BRIEN, HAIGHT, MARTIN, VANN and CULLEN, JJ., concur.

Order reversed, etc.

JAMES TILLEY et al., Appellants, v. SAMUEL D. COYKENDALL,
Respondent.

PLEADING—ACTION TO ENFORCE JUDGMENT, RECOVERED AGAINST A CORPORATION, AGAINST ITS PRESIDENT PERSONALLY—WHEN ALLEGATIONS OF COMPLAINT DO NOT STATE FACTS CONSTITUTING A CAUSE OF ACTION. An action upon an unsatisfied judgment, obtained against a foreign corporation for injury to property caused by its negligence, cannot be maintained against the president of the corporation personally, upon a complaint alleging that process in the action in which the judgment was obtained was served upon him as president of such corporation, and that as such officer he caused the suit to be defended, and was personally cognizant of all the steps in the litigation; that, at the time of the injuries to plaintiffs' property and during the action in which such judgment was obtained, the corporation was a myth and did not exist, because the organization required by the law under which the corporation was organized was not kept up, and that during such time its president was the real owner and in possession of the property, and the real party engaged in the business of the corporation; since the defendant did not make himself personally liable by defending the action in which the judgment was obtained as president of the corporation, nor can he be personally charged with the payment of a judgment recovered in an action against it to which he was not a party, where he is not charged with any personal negligence resulting in the injuries constituting the basis of the judgment sued upon in the present action; and hence he cannot be compelled to try that question in a court of equity upon a complaint which does not charge it.

Tilley v. Coykendall, 69 App. Div. 92, affirmed.

(Argued November 11, 1902; decided December 9, 1902.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered February 25, 1902, which affirmed an interlocutory judgment of Special Term sustaining a demurrer to the complaint.

The nature of the action, the facts, so far as material, and the question certified are stated in the opinion.

Nelson Zabriskie for appellants. The facts alleged in the complaint show that Samuel L. Coykendall, at the time in question, was doing business under the name of the Beverwyck Towing Company and was the sole owner of all its stock, bonds, vessels and other property, having purchased and subsequently paid for the same with his own money; that he was in sole possession of all of its vessels, operating the same for his own benefit and gain; that he did not pretend to keep up the corporate organization of said company by the election of officers, directors, etc., and could not have done so, as he alone owned all the stock. (*L. & N. R. R. Co. v. Schmidt*, 177 U. S. 230; *I. T. Co. v. B. & O. T. Co.*, 51 Fed. Rep. 49.) The estoppel contended for by defendant could, in no event, go beyond the right to insist upon the trial of the City Court action that no proof could be given there without amendment and without showing the facts here disclosed that Mr. Coykendall was the company. (2 Cook on Corp. § 664; *Seacord v. Pendleton*, 55 Hun, 579; *Fuller v. Rowe*, 57 N. Y. 23; *Vaugh v. Hixon*, 50 Kan. 773; *Anthony v. A. G. Co.*, 146 N. Y. 407; *The John G. Stevens*, 170 U. S. 113; *Schmidt v. L. C. & L. Ry. Co.*, 35 S. W. Rep. 137; *Skinner v. Smith*, 134 N. Y. 240; *People v. Ballard*, 136 N. Y. 639; *Denike v. N. Y. & R. L. & C. Co.*, 80 N. Y. 599.) Upon the principle of *res adjudicata* Samuel D. Coykendall is liable on the judgments in question in this suit. (Freeman on Judgments, § 174; *E. M. Co. v. D. B. Mfg. Co.*, 50 Fed. Rep. 193; *Valentine v. Mahoney*, 37 Cal. 389; *Schmidt v. L. C. & L. Ry. Co.*, 35 S. W. Rep. 135; *Ashton v. City of Rochester*, 133 N. Y. 187; *Robbins v. Chicago*, 4 Wall. 657; *Green v. Bogue*, 158 U. S. 478; *Williams v. Barkley*, 165 N. Y. 48.) When a privy, or the real, although not the nominal defendant in the original action, is sought to be held liable after the previous litigation, the cause of action must not be upon the original cause of action, but upon the judgments

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

obtained therein, and the defendant in the new suit is liable, if at all, for the costs which have accrued by reason of his litigation as well as for the original claim and interest. (*Schmidt v. L. C. & L. Ry. Co.*, 35 S. W. Rep. 135; *Munzinger v. Courier Co.*, 82 Hun, 575; *Stuyvesant v. Weil*, 41 App. Div. 551; 167 N. Y. 421; Herman on Estoppel, 560; *Tootle v. Coleman*, 107 Fed. Rep. 41; *Carr v. Rischer*, 119 N. Y. 117; *Coatsworth v. L. V. R. Co.*, 156 N. Y. 451; *Sage v. Culver*, 147 N. Y. 241; *Greeff v. E. L. Assur. Soc.*, 160 N. Y. 19; *Spencer v. W. R. R. Co.*, 36 App. Div. 446; *Parker v. P. Co.*, 36 App. Div. 208; *Harris v. Elliott*, 163 N. Y. 169.)

Amos Van Etten for respondent. The plaintiffs having recovered a personal judgment against the Beverwyck Towing Company, alleging it to be a corporation, for damages to a boat and cargo of ice, such judgment cannot be transferred in equity against Samuel D. Coykendall, who is not named in the judgment or in the complaint upon which judgment was recovered, and his property cannot be taken to satisfy the judgment, he never having had a day in court to contest a personal claim made against him. (5 Thomp. on Corp. § 6598; *B. L. T. & S. D. Co. v. M. G. Co.*, 162 N. Y. 76.) The allegations of the complaint estop the plaintiffs from a recovery in this action, but do not conclude the defendant herein. (6 Thomp. on Corp. § 7644; Morawetz on Priv. Corp. § 748; *Fisher v. Hepburn*, 48 N. Y. 41; *Bassett v. Fish*, 75 N. Y. 303; *Shaw v. Cook*, 78 N. Y. 194; *N. Y. M. P. Co. v. Remington*, 89 N. Y. 22; *Goebel v. Iffa*, 111 N. Y. 170; *Barber v. Kendall*, 158 N. Y. 401; *Collins v. Hydorn*, 135 N. Y. 320, 324; *Rathbone v. Hooney*, 58 N. Y. 467; Bigelow on Estoppel [2d ed.], 65.) The judgment sustaining this demurrer was properly made and the decision of the justice at Special Term and the Appellate Division should be affirmed. (*Greeff v. E. L. Assur. Society*, 160 N. Y. 29.)

O'BRIEN, J. The courts below have sustained a demurrer to the complaint, and, since no final judgment has been

entered in the case, the Appellate Division has certified to us the question whether the complaint states facts sufficient to constitute a cause of action.

The theory of the complaint is somewhat novel and peculiar. It alleges in substance that on the 2d day of December, 1898, the plaintiff recovered a judgment for \$1,126.02, damages and costs, against a corporation known as the Beverwyck Towing Company, after a trial of the issues in the case and upon pleadings wherein the company defendant was charged with negligence when one of its steam towboats was engaged in towing upon the Hudson river the plaintiff's canal boat and her cargo, whereby the canal boat and cargo were damaged by the carelessness and negligence of the corporation engaged in towing on the river and canals. The corporation answered the complaint and denied all negligence on its part, and this issue was tried in the City Court and resulted in a verdict for the plaintiffs. The complaint then states that this judgment was subsequently affirmed in the General Term of the City Court, and afterwards by the Appellate Term of the Supreme Court, and that costs on both appeals were awarded against the corporation. Subsequently, as alleged, executions were issued upon these several judgments to the sheriff of the proper counties, and returned wholly unsatisfied.

Thus far all the complaint shows is that the plaintiffs had a good cause of action against the towing company and recovered. It is, however, alleged that the present defendant was the president of the corporation upon whom the service of process was made in that action, and as such officer he caused the suit to be defended and the appeals taken, and generally was personally cognizant of all the steps in the litigation. The damage to the plaintiffs' canal boat and cargo, as appears from the complaint, was suffered on the 25th of May, 1896. The suit to recover damages was commenced on the 31st of August, 1896. The complaint in the present case then proceeds to allege that on the 7th of August, 1894, about two years before the action for the damages was instituted, the defendant purchased all the stock and boats of the towing

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

company with all the property of the corporation, and then went into possession of the property and business of the corporation and was so in possession and conducting the business at the time of the accident and collision which resulted in the damage to plaintiffs' canal boat and cargo. It seems that the corporation was organized under the laws of West Virginia, and the other allegations of the complaint are directed to showing that at the time of the injury to plaintiffs' boat and cargo the corporation, as such, did not exist; that the organization required by the law of its creation was not kept up and so the corporation was a mere myth, and that the defendant was the real party engaged in the towing business and should be held responsible for the plaintiffs' damage and loss. The relief demanded is that the defendant be charged and held bound by the several judgments against the towing company and directed to pay the same, with costs of the action.

What the complaint really shows is that the plaintiffs never had any cause of action against the towing company as a corporation; that they sued the wrong party and recovered judgment against what was supposed to be a legal entity but which in fact had no actual or legal existence whatever. It is not at all probable that the corporation when sued by the plaintiffs for damages resulting from negligence could have made any defense on the ground that its president had become the owner of all its property and obligations and that its corporate organization had not been kept in life. Corporations do not always die from neglect to hold elections or to keep up the regular succession of directors and officers. It generally requires the judgment or decree of a competent court or an edict of the legislature or sovereign power to wholly terminate the legal existence of a corporation. In the absence of one or the other of these events a corporation, however it may be embarrassed from loss of its property or deserted by its officers, has generally life enough left to enable it to sue or be sued, and since the plaintiffs insisted upon treating this towing company as still existing for that purpose it is difficult to see how it could have avoided the issue which the suit presented. If

the corporation had in its answer set forth all the facts that the plaintiffs allege in this action they would not have availed it as a defense or shielded it from the charge which the plaintiffs made.

The defendant, as president of the company, did not make himself personally liable by defending the action. That is only the duty of the president of every corporation when sued upon a claim which he deems to be unjust or unlawful. It is difficult to perceive how the defendant can be charged with the payment of a judgment recovered in an action against the company to which he was in no legal sense a party. If the complaint had charged that the defendant was doing business under the name of the towing company, and that it was his personal negligence that produced the injury that resulted in plaintiffs' damages, then it is possible that the complaint could be sustained as an original action for negligence against the defendant, but nothing of that kind appears on the face of the complaint. It proceeds entirely upon the theory that upon some principle the defendant has in law or equity become personally liable for the payment of the judgment. Certainly that result does not follow from the mere fact that as an officer of the corporation he caused the suit to be defended, and in that capacity participated in the litigations. The defendant has never been charged with any personal negligence resulting in the damages which constitute the basis of the plaintiffs' claim. He has not yet had any opportunity to try that question, and before he can be required to respond in damages for his personal negligence, he is entitled to a trial of that issue before a jury. The fact that a mythical corporation under the control and charge of the defendant as its president has had such a trial does not answer the objection, since it does not follow that, because a jury awarded damages in an action against it, the same or any damages would have been given in an action against the defendant personally. He is now called upon by the complaint in this action to pay a judgment rendered in a case to which he was not a party, and even if he was he could not interpose any defense which only

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

applied to him as an individual. On the face of the complaint it does not appear that the defendant ever had his day in court to answer any charge of personal negligence, and he cannot now be compelled to try that question in a court of equity upon a complaint that does not charge it.

There is a line of cases that hold that where one corporation becomes merged in another or consolidated, or where one corporation takes over the property and franchises of another and practically absorbs it, the surviving or absorbing corporation becomes liable in certain cases and under certain circumstances for the obligations of the corporation that has been merged, consolidated or absorbed. Many of these cases have been cited in the learned opinion below, and others are referred to in recent discussions in this court. (*People ex rel. Manh. Ry. Co. v. Barker*, 165 N. Y. 330.) Perhaps the case that is the strongest reliance of the learned counsel for the plaintiffs is that of *Louisville & Nashville Railroad Company v. Schmidt* (177 U. S. 230). There is, however, a very marked and material distinction between that case and this. In the first place, the original action in that case was against a real existing corporate entity, against which an actual cause of action existed, and not as here against a mere myth, that upon the allegations of the complaint was never liable to the plaintiffs. In the second place, the railroad ultimately held liable for the judgment had been during the progress of the original action made a party and had interposed a defense, and, therefore, could very well be held to be bound by the judgment in the same way as if it had been sued in the first instance. Here the defendant, though upon the theory of the complaint the real party who committed the wrong, was never sued or impleaded, and never appeared or connected himself with the litigation, save only as an officer of the towing company. There is no principle that we are aware of by which a court of equity can now decree him as liable to pay the judgment or adjudge that he be charged with or bound by it.

It may be that the plaintiffs have some remedy for the collection of their judgment by an action of sequestration against

Opinion of the Court, per O'BRIEN, J. [Vol. 172, N. Y. Rep.]

the corporation or by proceedings supplementary to execution, or upon the original claim by an amendment of the complaint, but we think the present complaint is bad.

The order appealed from should be affirmed, with costs, and the question certified answered in the negative, with leave to the plaintiffs to amend the complaint within twenty days on payment of costs.

PARKER, Ch. J., HAIGHT, MARTIN and CULLEN, JJ. (and BARTLETT, J., in result), concur; VANN, J., absent.

Order affirmed.

MEMORANDA

OF

*DECISIONS RENDERED DURING THE PERIOD EMBRACED IN
THIS VOLUME.*

CHARLES DEUTERMAN et al., as Executors of CHARLES DEUTERMAN, Deceased, Appellants, v. ALEXANDER POLLOCK et al., Respondents.

Deuterman v. Gainsborg, 54 App. Div. 575, affirmed.
(Argued April 16, 1902; decided October 7, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 26, 1901, modifying and affirming as modified a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

Eugene Frayer for appellants.

Wilson Brown, Jr., for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, MARTIN, VANN, CULLEN and WERNER, JJ.

HENRY B. DORNEY, Respondent, v. HUGH O'NEILL, Appellant.

Dorney v. O'Neill, 60 App. Div. 19, affirmed.
(Argued June 23, 1902; decided October 7, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 11, 1901, affirming a judgment in favor of plaintiff entered

upon a verdict and an order denying a motion for a new trial.

David B. Hill and *Eugene Lamb Richards, Jr.*, for appellant.

Charles Steckler and *Levin L. Brown* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ. Not voting: O'BRIEN, J.

THE NATIONAL COMMERCIAL BANK OF ALBANY, Appellant, *v.* THE LACKAWANNA TRANSPORTATION COMPANY, Respondent.

National Commercial Bank v. Lackawanna Transp. Co., 59 App. Div. 270, affirmed.

(Argued June 28, 1902; decided October 7, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered April 19, 1900, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury.

John M. Bowers, *William Lansing* and *Latham G. Reed* for appellant.

John G. Milburn for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

THERESIA BINZEN, Respondent, *v.* SIMON EPSTEIN et al., Appellants.

Binzen v. Epstein, 58 App. Div. 304, affirmed.

(Argued June 24, 1902; decided October 7, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April

1, 1901, upon an order reversing a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term and directing judgment in favor of plaintiff.

H. H. Snedeker for appellants.

Charles F. Brown and *Frank Schaeffler* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

HEMAN S. BREWER, Respondent, v. WILLIAM J. GILMORE,
Appellant.

Brewer v. Gilmore, 57 App. Div. 637, affirmed.

(Argued June 25, 1902; decided October 7, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 9, 1900, affirming a judgment in favor of plaintiff entered upon the report of a referee.

John A. Delehanty for appellant.

Robert Averill for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

HENRY HENTZ, Appellant, v. THEODORE A. HAVEMEYER et al.,
Respondents.

Hentz v. Havemeyer, 58 App. Div. 36, affirmed.

(Argued June 26, 1902; decided October 7, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 15, 1901, affirming a judgment in favor of defendants entered

upon a dismissal of the complaint by the court at a Trial Term.

Barclay E. V. McCarty, William D. Guthrie and Jared G. Baldwin, Jr., for appellant.

John E. Parsons for respondents.

Judgment affirmed, with costs, on opinion below.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

TABERNACLE BAPTIST CHURCH, Respondent, *v.* FIFTH AVENUE BAPTIST CHURCH OF NEW YORK CITY, Appellant.

Tabernacle Baptist Church v. Fifth Ave. Baptist Church, 80 App. Div. 327, affirmed.

(Argued June 26, 1902; decided October 7, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 7, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

George Welwood Murray and Charles P. Howland for appellant.

Benjamin Scharps and David Scharps for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., MARTIN, VANN and WERNER, JJ. Not voting: O'BRIEN, BARTLETT and CULLEN, JJ.

MASONS' SUPPLIES COMPANY, Respondent, *v.* ROLAND D. JONES, Appellant, Impleaded with Others.

Masons' Supplies Co. v. Jones, 58 App. Div. 231, affirmed.

(Argued June 27, 1902; decided October 7, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April

25, 1901, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

J. Alexander Koonen for appellant.

George B. Dunn for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

CATHERINE McCANN, as Administratrix of SIMON McCANN, Deceased, Respondent, *v.* NEW YORK AND QUEENS COUNTY RAILWAY COMPANY, Appellant.

McCann v. N. Y. & Queens Co. Ry. Co. 73 App. Div. 805, appeal dismissed. (Argued October 6, 1902; decided October 7, 1902.)

MOTION to dismiss an appeal from a judgment entered upon an order of the Appellate Division of the Supreme Court in the first judicial department, made at the June term 1902, which reversed a judgment of the trial court setting aside a verdict and granting a new trial, and directed judgment upon the verdict.

The motion was made upon the ground that the Court of Appeals had no jurisdiction to entertain the appeal.

Michael P. O'Connor for motion.

William E. Stewart opposed.

Motion granted and appeal dismissed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* ALBERT T. PATRICK, Appellant.

(Argued October 6, 1902; decided October 8, 1902.)

MOTION, under the provision of section 536 of chapter 369 of the Laws of 1902, to extend time in which to move argument of appeal from judgment of death.

John C. Tomlinson and Edgar J. Kohler for motion.

No one opposed.

Motion denied on the ground that defendant has six months from September 1, 1902, the time the act took effect, in which to argue the appeal, which time the court deems amply sufficient.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, CULLEN and WERNER, JJ. Dissenting: VANN, J.

LAURA A. WEIANT, Respondent, v. THE ROCKLAND LAKE TRAP
ROCK COMPANY et al., Appellants.

Weiant v. Rockland Lake Trap Rock Co., 61 App. Div. 883, appeal dismissed.

(Argued October 6, 1902; decided October 14, 1902.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 8, 1901, affirming an order of Special Term which denied a motion to vacate and set aside a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The motion was made upon the ground that the appeal is unauthorized and the Court of Appeals without jurisdiction to entertain it.

William McCauley for motion.

Wilson Brown, Jr., opposed.

Motion granted and appeal dismissed, with ten dollars costs.

THEODORE WENK, Appellant, v. THE CITY OF NEW YORK et al., Defendants.

THE UNITED STATES LAND AND IMPROVEMENT COMPANY, LIMITED, et al., Respondents.

(Submitted October 6, 1902; decided October 14, 1902.)

Motion for reargument denied, with ten dollars costs. (See 171 N. Y. 607.)

ELIZABETH FOGERTY, as Administratrix of CHARLES E. FOGERTY, Deceased, Appellant, v. THE UNION RAILWAY COMPANY OF NEW YORK CITY, Respondent.

(Submitted October 6, 1902; decided October 14, 1902.)

Motion for reargument denied, with ten dollars costs. (See 171 N. Y. 670.)

MATTHEW HAWES, Respondent, v. NEW YORK, WESTCHESTER AND CONNECTICUT TRACTION COMPANY, Appellant.

Reported below, 72 App Div. 681.

(Argued October 6, 1902; decided October 14, 1902.)

Motion to dismiss an appeal from a judgment entered May 6, 1902, upon an order of the Appellate Division of the Supreme Court in the second judicial department affirming an interlocutory judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The motion was made upon the grounds that the judgment was interlocutory and, therefore, not appealable, and that the Appellate Division, having unanimously decided that the findings of fact were supported by the evidence, the case did not present any question of law for review.

Arthur M. Johnson for motion.

Augustus Van Wyck and *Charles W. Church, Jr.*, opposed.

Motion denied, with ten dollars costs.

THE PHENIX NATIONAL BANK, Appellant, v. JOHN R. KEIM, as Assignee for THOMAS H. SPAULDING and WILLIAM H. CROSBY, Appellant, and THOMAS H. SPAULDING et al., Respondents.

Reported below, 69 App. Div. 201.

(Argued October 6, 1902; decided October 14, 1902.)

MOTION to dismiss an appeal from a judgment entered May 2, 1902, upon an order of the Appellate Division of the Supreme Court in the first judicial department, which reversed an interlocutory judgment in favor of plaintiff and a final judgment entered thereon upon the report of a referee, and dismissed an appeal from an order denying a motion to amend the final judgment.

The motion was made upon the ground that as the judgment appealed from was entered on default, no appeal lies therefrom to the Court of Appeals.

Norris Morey for motion.

S. W. Rosendale opposed.

Motion denied, with ten dollars costs.

LOTTIE G. DIMON, as Administratrix of HENRY G. DIMON, Deceased, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY et al., Appellants.

Reported below, 74 App. Div. 626.

(Argued October 6, 1902; decided October 14, 1902.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 23, 1902, affirming a judgment in favor of plaintiff entered upon a verdict and order denying a motion for a new trial.

The motion was made upon the ground that the exceptions appearing in the record were frivolous and without merit.

J. Addison Young for motion.

John F. Brennan opposed.

Motion denied, with ten dollars costs.

MARY ANN ADAMS et al., Respondents, v. GEORGE ELWOOD,
Appellant.

Reported below, 72 App. Div. 632.

(Argued October 6, 1902; decided October 14, 1902.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 4, 1902, affirming a judgment in favor of plaintiffs entered upon the report of a referee.

The motion was made upon the grounds that the Appellate Division had unanimously decided that the findings of fact were warranted by the evidence and that there were no other questions of law to be reviewed; also, that the appellant had failed to file a proper undertaking.

R. J. Shadbolt for motion.

William L. Mathot opposed.

Motion denied, with ten dollars costs.

THE CITY OF ROCHESTER, Respondent, v. ROCHESTER BILL
POSTING COMPANY, Appellant.

City of Rochester v. Rochester Bill Posting Co., 70 App. Div. 623, appeal dismissed.

(Submitted October 6, 1902; decided October 14, 1902.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, made at the March term, 1902, affirming a judgment in favor of plaintiff entered upon a decision of the court at Special Term.

The motion was made upon the ground that the return on appeal had not been filed.

William A. Sutherland for motion.

No one opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

BOYLE & EVERTS COMPANY, Respondent, v. JOHN FOX et al.,
Appellants.

Boyle & Everts Co. v. Fox, 72 App. Div. 617, appeal dismissed.
(Argued October 6, 1902; decided October 14, 1902.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 2, 1902, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

The motion was made upon the ground that there was no question of law involved in the appeal and that the Court of Appeals had, therefore, no jurisdiction to entertain the same.

Milton Mayer for motion.

Joseph A. Farley opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

BEATRICE PRESSWOOD KING, Appellant, v. ARTHUR R. KING,
Respondent.

King v. King, 73 App. Div. 547, appeal dismissed.
(Argued October 6, 1902; decided October 14, 1902.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 23, 1902, affirming a judgment in favor of defendant entered upon a verdict directed by the court and an order denying a motion for a new trial.

The motion was made upon the ground that the Court of Appeals had no jurisdiction to entertain the appeal, the record presenting no question of law for review.

Daniel E. Delavan for motion.

G. Burchard Smith opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

MARK E. SANDFORD, Appellant, v. HENRY WAGNER,
Respondent.

Sandford v. Wagner, 71 App. Div. 617, appeal dismissed.
(Submitted October 6, 1902; decided October 14, 1902.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 26, 1902, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

The motion was made upon the grounds that no question of law was involved in the appeal and that the Court of Appeals had, therefore, no jurisdiction to entertain it.

Edward Hymes for motion.

Alex. Thain opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

SALVATORE PEGGO, Respondent, v. THOMAS DINAN, Appellant.

Peggo v. Dinan, 72 App. Div. 434, appeal dismissed.
(Argued October 6, 1902; decided October 14, 1902.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the second judicial department, entered May 29, 1902, which reversed an order of Special Term denying a motion by plaintiff to amend a judgment previously entered against him and granted said motion.

The motion was made upon the ground that the order of the Appellate Division herein was not appealable to the Court of Appeals as a matter of right.

Jonathan Deyo and *John M. Gardner* for motion.

Abram J. Rose and *Alfred C. Petté* opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

LOUISA M. KELLER, as Executrix of GEORGE KELLER,
Deceased et al., Appellants, v. GEORGE A. LEE,
Respondent.

Keller v. Lee, 66 App. Div. 184, appeal withdrawn.
(Argued October 6, 1902; decided October 14, 1902.)

MOTION to withdraw an appeal from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 18, 1901, reversing a judgment in favor of plaintiffs entered upon a verdict directed by the court and an order denying a motion for a new trial and granting a new trial.

L. H. Jones for motion.

Loran L. Lewis, Jr., opposed.

Motion granted upon paying the taxable costs of this appeal and ten dollars costs of motion.

EPHRAIM B. LEVY, Respondent, v. JOHN SCHREYER, Appellant.

(Argued October 6, 1902; decided October 14, 1902.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 11, 1898, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The motion was made upon the ground that the appeal was not taken within one year after the filing of the final judgment of the Appellate Division.

Seward Baker for motion.

Alex. Thain opposed.

Motion granted and appeal dismissed, with ten dollars costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM H. WEISE, Appellant, v. JOHN J. SCANNELL, as Fire Commissioner of the City of New York, Respondent.

People ex rel. Weise v. Scannell, 44 App. Div. 642, affirmed.
(Argued October 6, 1902; decided October 21, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 25, 1899, which quashed a writ of certiorari to review the determination of the defendant in dismissing the relator from service in the fire department of the city of New York and affirmed the proceedings.

Daniel F. Kiely and *Joseph I. Green* for appellant.

George L. Rives, Corporation Counsel (*Theodore Connolly* of counsel), for respondent.

Order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. CENTRAL UNION GAS COMPANY, Appellant, v. JAMES L. WELLS et al., as Commissioners, Composing the Board of Taxes and Assessments for the City of New York, Respondents.

People ex rel. Central Union Gas Co. v. Wells, 73 App. Div. 626, affirmed.
(Argued October 6, 1902; decided October 21, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 18, 1902, which affirmed an order of Special Term quashing a writ of certiorari to review an assessment upon the property of the relator for the purpose of taxation.

John A. Garver for appellant.

George L. Rives, Corporation Counsel (*George S. Coleman* and *Curtis A. Peters* of counsel), for respondents.

Order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, HAIGHT, VANN, CULLEN and WERNER, JJ. Not voting: BARTLETT, J.

In the Matter of the Appraisal under the Transfer Tax Act of the Estate of JOSEPHINE LOUISE NEWCOMB, Deceased.

BRANDT V. B. DIXON et al., as Executors, etc., Appellants; The COMPTROLLER OF THE STATE OF NEW YORK, Respondent.

Matter of Newcomb, 71 App. Div. 806, affirmed.
(Argued October 6, 1902; decided October 21, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 23, 1902, which affirmed an order of the New York County Surrogate's Court assessing the transfer tax upon the estate of Josephine Louise Newcomb, deceased.

George F. Canfield for appellants.

Julius Offenbach for respondent.

Order affirmed, with costs, on opinion below.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ.

In the Matter of the Accounting of BRIDGET GOETZ et al., Respondents, as Executors of and Trustees under the Will of IGNACE GOETZ, Deceased.

EDWARD P. GOETZ et al., Appellants.

Matter of Goetz, 71 App. Div. 272, appeal dismissed.
(Argued October 6, 1902; decided October 21, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 5, 1902, which reversed a decree of the New York County Surrogate's Court construing the will of Ignace Goetz, deceased, and remitted the case to the surrogate for further action.

Thomas F. Byrne for appellants.

William H. Hamilton for respondents.

Appeal dismissed, without costs, on the ground that the order appealed from is not a final order; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ.

ALEXANDER FRANKENSTEIN et al., Appellants, v. BARNETT HAMBURGER et al., Defendants, and ISAAC M. BERINSTEIN, Respondent.

Frankenstein v. Hamburger, 78 App. Div. 852, appeal dismissed.
(Argued October 7, 1902; decided October 21, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 26, 1902, which affirmed an order of Special Term settling the accounts of a receiver of rents and profits in an action for the foreclosure of a mortgage.

Leonard Bronner and *A. H. Parkhurst* for appellants.

Max L. Schallek for respondent.

Appeal dismissed, with costs, on the ground that the order appealed from was made in an action and not in a special proceeding; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BAETLETT, HAIGHT, VANN, CULLEN and WERNER, JJ.

In the Matter of the Appraisal, under the Transfer Tax Act,
of the Estate of JOHN D. BREZ, Deceased.

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THE COMPTROLLER OF THE STATE OF NEW YORK, Appellant;
JULES RACINE et al., as Executors, etc., Respondents.

TRANSFER TAX ON SUCCESSION OF LIFE TENANT—LEGISLATION REQUIRED TO MAKE IMPOSITION OF TAX FAIRER TO LIFE TENANT. Although the provision of the Transfer Tax Act (L. 1896, ch. 908, § 230; and, L. 1899, ch. 76) requiring the transfer tax upon contingent remainders to be paid forthwith out of the *corpus* of the estate transferred, has been held to be constitutional, because the rate or amount of tax on the succession of the life tenant is within the discretion of the legislature to prescribe and is, in effect, simply the imposition of an additional tax on the life tenant (See *Matter of Vanderbilt*, 172 N. Y. 69), *it seems*, bearing in mind the general character of the tax and that the legislature has deemed it right to prescribe different rates of taxation, depending on the relation of the legatee or devisee to the deceased, that, if it is desired to make taxes on remainders payable immediately, it would be fairer to the life tenant to have the tax assessed at the lowest rate of any succession

provided for by the will, and that, in case the remainder eventually vesting should prove taxable at a higher rate, then such increased tax should be payable at the time of its enjoyment, and that legislation to that effect should be enacted.

Matter of Brez, 69 App. Div. 619, reversed.

(Argued October 7, 1902; decided October 21, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, made March 7, 1902, which affirmed a decree of the Kings County Surrogate's Court assessing a transfer tax upon the estate of John D. Brez, deceased.

Robert B. Bach for appellant.

Frederic R. Coudert, Jr., and *Howard Thayer Kingsbury* for respondents.

CULLEN, J. We are of opinion that all the questions presented on this appeal, including both the construction and the constitutionality of the statute of 1899 (Chap. 70) providing for the present appraisal and taxation of remainders created by will upon contingencies or where the ultimate beneficiaries cannot be immediately ascertained, are disposed of by our recent decision in *Matter of Vanderbilt* (172 N. Y. 69), and the order appealed from must, therefore, be reversed on the authority of that case. We feel, however, justified in calling the attention of the legislature to an inequality caused by the statute, which may have escaped its notice and which we submit to its wisdom whether it would not be proper to remedy. In all the cases covered by this statute there must be one or more intermediate estates, generally life estates, during the period elapsing between the death of the testator and the happening of the contingency (commonly the death of the life tenant) on which the remainders become vested absolutely and the remaindermen become certain. The tax on the remainders being paid out of the *corpus* of the estate diminishes the income of the life tenant by the interest on the amount of the tax. The constitutionality of this provision, though it affects the life tenant, we have upheld because the

rate or amount of tax on the succession of the life tenant is within the discretion of the legislature to prescribe, and the scheme in effect is simply the imposition of an additional tax on the life tenant. It is evident, however, that the legislature has determined that in many instances the tax may be excessive; for while it directs that the tax shall be imposed at the highest rate for any possible succession that may occur in any contingency, it provides that if it eventually transpires that the succession which actually happens is subject to a lower rate the excess of tax, with interest, shall be repaid by the state. The interest on this excess ought fairly to go to the life tenant, though the statute is silent on the subject. But even if given to the life tenant it can be repaid to his estate only after his death, for it is commonly his death that finally settles the rate of tax. This is hardly an equivalent for the diminution of his income during life, an income oftentimes necessary for his support. It seems to us that, bearing in mind the general character of the tax and that the legislature has deemed it right to prescribe different rates of taxation depending on the relation of the legatee or devisee to the deceased, if it is desired to make taxes on remainders payable immediately, it would be fairer to the life tenant to have the tax assessed at the lowest rate of any succession provided for by the will, and in case the remainder eventually vesting should prove taxable at a higher rate, then such increased tax should be payable at the time of its enjoyment.

Nor would this change be detrimental to the state. Our experience informs us that in the majority of cases the remainders are first appointed to the issue of the life tenant and descendants of the testator and are given to collaterals or strangers only in default of issue. The lowest rate of tax thus usually proves the final rate. Where the state imposes in the first instance a higher rate of tax it becomes obligated to repay the excess after a lifetime with six per cent interest, while it could borrow the money at half that rate.

The orders of the surrogate and Appellate Division should be reversed and proceedings remitted to the surrogate of Kings county to assess the tax as prescribed in the statute.

BARTLETT, J. (dissenting). I am of opinion that the recent decision of this court in *Matter of Vanderbilt* (172 N. Y. 69) does not cover all the questions raised in this case and is, therefore, not a controlling authority.

John D. Brez died November 18th, 1899, leaving a last will and testament which was admitted to probate in Kings county on January 23rd, 1900.

The testator, after certain directions as to the investment of his residuary estate, directed his executors and trustees to pay to his sister, Elizabeth Aline Gillet, the income thereof, not exceeding twenty thousand dollars per year, the remainder to be capitalized and added to the principal.

In a construction suit this provision as to income was held illegal and void, and it was determined that Mrs. Gillet was entitled to receive the total income of the residuary estate if she had no issue. If issue were born to her the income in excess of twenty thousand dollars per year should be paid to such issue. If she died leaving issue, they would be entitled to the principal of the residuary estate. If she died leaving no issue, the will provides that the income of the residuary estate "be devoted to purposes of charity or religion of the Protestant faith only; or still better to education and art applied to industry, either directly or by means of encouragement, such as prizes for essays or prizes for examples, or in any other way which, according to their best judgment, will be most beneficial to mankind, said income to be devoted and distributed by said executors and trustees, or by a society organized for that purpose, according to their best judgment and the wants of the times."

This clause of the will was also judicially construed, and it was held that upon the death of Mrs. Gillet, without issue, the discretionary powers "will vest in the qualifying executors then living or acting, or in default of any such executor, in the Supreme Court in perpetuity; that if the transfer to a society to be incorporated as above referred to be made, then the trust will vest in such society; if no such transfer be made by the executors, upon the death of the last surviving executor the trust and powers will vest in the Supreme Court in perpetuity."

This case involves the construction of the Transfer Tax Act, as amended by chapter 76 of the Laws of 1899. This act added the new provision in regard to imposing a transfer tax, as follows: "When property is transferred in trust or otherwise, and the rights, interests or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, *and such tax so imposed shall be due and payable forthwith, out of the property transferred*; provided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation *exempt from taxation under the provisions of this article*, or to a person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this article, with legal interest thereon from the time of payment."

The amount of the net residuary estate was determined by the appraiser to be \$1,022,178.72. The present value of the total residuary estate, after the death of Mrs. Gillet, was assessed at \$575,252, and the tax thereon at five per cent fixed at \$28,762.60. The remainder, in both real and personal estate, was declared to be contingent. This report was confirmed by the surrogate, but afterwards on appeal to him it was modified by striking out the interests of the unknown persons styled "contingent remaindermen" as not presently taxable or ascertainable, and that there was no present transfer of the remainder of the estate of the testator after the death of Mrs. Gillet, and that the fair market value of the interests to be hereafter transferred were not presently ascertainable, and that the imposition of the tax should be postponed. This order was unanimously affirmed by the Appellate Division.

We have, therefore, presented the question, where contin-

gent remaindermen are persons unborn, corporations unformed and charitable schemes undevised, whether it is competent for the legislature to take from the body of the residuary estate the highest rate of tax upon these contingent transfers, thereby reducing the income of the life tenant. In other words, are these contingent interests presently taxable?

It is insisted that our recent decision in the case of *Matter of Graves* (171 N. Y. 40) sustains in principle the validity of this tax. It is doubtless true that this case holds, following *Allen v. Stevens* (161 N. Y. 122), that the naming of indefinite beneficiaries in a will no longer invalidates a trust contemplating such beneficiaries, but that case did not in any way involve the present phase of the transfer tax now under consideration.

In the case before us we have a very peculiar and novel situation. (1) As to the issue of Mrs. Gillet, who are entitled to take the residuary estate at her death if they are in being at that time.

It is true that owing to the advanced age of Mrs. Gillet the probability of issue is quite remote, but the possibility of issue exists physiologically.

We have here possible contingent remaindermen not in being, to whom no transfer has been made, as it cannot logically be said that the effect of a will is to transfer from the testator to the beneficiary when the latter is not in existence.

(2) In the event of the failure of issue, the will directs the executors and trustees to use the income of the residue of the estate for the "purposes of charity or religion of the Protestant faith only, or, still better, to education and art applied to industry, either directly or by means of encouragement, such as prizes for essays or prizes for examples, or in any other way which, according to their judgment, will be most beneficial to mankind, said income to be devoted and distributed by said executors or trustees, or by a society organized for that purpose, according to their best judgment and the wants of the times."

We have here disclosed certain contingencies. The executors and trustees are authorized to devote the income of the residuary estate to purposes of charity or religion of the

Protestant faith only. If the executors should see fit to organize a strictly religious corporation of the Protestant faith it would not be subject to the transfer tax. On the other hand, if it was a charitable society of the Protestant faith, it would be liable to the transfer tax. - (*Matter of Watson*, 171 N. Y. 256.)

The important point presented, which was not involved in *Matter of Vanderbilt* (*supra*), is, that aside from the possibility of unborn heirs becoming contingent remaindermen, there is the additional possibility that a religious corporation may be organized in the future, not taxable, and become the remainderman, entitled in perpetuity to the income of the trust property.

Notwithstanding this situation the legislature has provided that there shall be taken out, for the benefit of the state, from the principal sum, to the income of which the life tenant is entitled, a tax at the rate of five per centum, which is to be refunded to the estate with interest at the death of the life tenant if the property is transferred to a person or corporation exempt from taxation.

This may be meting out a certain measure of justice to the remainderman, but the life tenant, who will have passed away when restitution is made, has been deprived of the income on the amount of the tax. How large this tax may be in these days of great wealth is well illustrated in the Vanderbilt estate, where the transfer tax was enormous.

Under the operation of this amendment of 1899 it is possible for a life tenant to be deprived of the income from a large amount of property during the entire period of his life, which may endure for forty or fifty years.

At the instant of testator's death the life tenant becomes vested with the legal right to receive the income of the residuary estate during life. This right is property in the strictest sense of the term.

This court has repeatedly held that the transfer tax is not imposed upon property but on the right of succession or transfer.

What power has the state, even if it be omnipotent in the domain of taxation, as is so often said, to impose a transfer tax

when the remainderman, not in existence, may be a religious corporation, subject to no tax?

It is clearly, so far as the life tenant is concerned, depriving him of property without due process of law.

The power of the legislature to impose taxes is subject to certain constitutional limitations.

To say that the state may deprive a life tenant of the income of many thousands of dollars during half a century by presently collecting a transfer tax on an unvested residuary estate, where the corporate remainderman to enjoy it is yet to be created and may be exempt from taxation, is to override the plain provision of the Constitution prohibiting the taking of property without due process of law.

The order appealed from should be affirmed, with costs.

PARKER, Ch. J., HAIGHT and WERNER, JJ., concur with CULLEN, J.; O'BRIEN and VANN, JJ., concur with BARTLETT, J.
Order reversed, etc.

In the Matter of the Appraisal, under the Transfer Tax Act,
of the Estate of HENRY W. KING, Deceased.

THE COMPTROLLER OF THE STATE OF NEW YORK, Appellant;
FRANCIS KING et al., as Executors, etc., Respondents.

Matter of King, 71 App. Div. 581, affirmed.

(Argued October 7, 1902; decided October 21, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 21, 1902, which reversed an order of the New York County Surrogate's Court assessing a transfer tax upon the estate of Henry W. King, deceased.

W. E. Kisselburgh, Jr., and *H. Louis Jacobson* for appellant.

Clarence E. Thornall for respondents.

Order affirmed, with costs, on opinion below.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ.

In the Matter of the Accounting of FRANCES BAKER, Appellant, as Administratrix of the Estate of ELIZABETH WILBUR, Deceased.

MARY WILBUR IRWIN et al., Respondents.

Matter of Baker, 72 App. Div. 211, affirmed.
(Argued October 7, 1902; decided October 21, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, made March 4, 1902, which modified and affirmed as modified a decree of the Washington County Surrogate's Court settling the accounts of Frances Baker, as administratrix of the estate of Elizabeth Wilbur, deceased.

C. H. Sturges for appellant.

James C. Rogers for respondents.

Order affirmed, with costs to the respondents payable out of the estate; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ.

In the Matter of the Appraisal, under the Transfer Tax Act, of the Estate of JOHN L. ROGERS, Deceased.

WILMER S. WOOD et al., as Trustees under the Will of SILAS WOOD, Deceased, et al., Appellants; THE TREASURER OF ORANGE COUNTY, Respondent.

Matter of Rogers, 71 App. Div. 461, affirmed.
(Submitted October 7, 1902; decided October 21, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, made April 18, 1902, which modified and affirmed as modified an order of the Orange County Surrogate's Court assessing a transfer tax upon the estate of John L. Rogers, deceased.

Edgerton L. Winthrop, Jr., and Flamen B. Candler for appellants.

Edward H. Fallows and James G. Graham for respondent.

Order affirmed, with costs, on opinion below.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. OSCAR F. ZOLLIKOFFER et al., Appellants, v. THOMAS L. FEITNER et al., as Commissioners of Taxes and Assessments of the City of New York, Respondents.

People ex rel. Zollikoffer v. Feitner, 74 App. Div. 130, affirmed.
(Argued October 7, 1902; decided October 21, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 19, 1902, which reversed an order of Special Term denying a motion to quash a writ of certiorari to review the proceeding of the defendants in assessing property owned by the relators for the purposes of taxation and granted such motion.

Theodore Sutro for appellants.

George L. Rives, Corporation Counsel (James M. Ward and David Rumsey of counsel), for respondents.

Order affirmed, with costs, on the authority of *People v. rel. Washington Building Co. v. Feitner* (163 N. Y. 384), no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ.

THE MERCHANTS' NATIONAL BANK OF PLATTSBURGH, Respondent, v. ERASTUS H. BARNES, Appellant, Impleaded with Others.

APPEAL — COURT OF APPEALS HAS NO POWER TO SET ASIDE VERDICT AGAINST THE WEIGHT OF EVIDENCE. Where a judgment entered upon a verdict has some evidence to support it, however unworthy of belief it

may seem, the Court of Appeals has no power to reverse the judgment solely upon that ground; that power rests with the Appellate Division of the Supreme Court.

Merchants' Nat. Bank v. Barnes, 57 App. Div. 680, affirmed.

(Argued October 18, 1902; decided October 21, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 30, 1901, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Thomas F. Conway and *John N. Blair* for appellant.

L. L. Shedden for respondent.

PARKER, Ch. J. A careful examination of this record leads us to doubt that justice has been meted out to the parties to this action. The learned counsel for the appellant has tried to persuade us that there is no evidence in support of this judgment, and hence that it may be reversed. But we cannot agree with that contention, for there is some evidence which the jury has seen fit to credit, and however unworthy of belief it may seem to this court, the power does not reside here to reverse the judgment on that ground. That power, one of the most important of all judicial powers—the exercise of which is absolutely necessary to the due administration of justice—has devolved upon the Appellate Division of the Supreme Court, which may and should, whenever a verdict or decision is clearly against the weight of evidence—influenced perhaps by an ill-advised public sentiment, by prejudice against a non-resident of the locality, or by manifest perjury—set it aside on that ground. This court is confined by the Constitution to a review of questions of law, and as we do not find any erroneous rulings by the trial court in this record which will support a reversal, we must affirm the judgment, with costs.

GRAY, BARTLETT, HAIGHT, MARTIN, CULLEN and WERNER, JJ., concur.

Judgment affirmed.

In the Matter of the Application of HARRY B. CHAPMAN, Respondent, for the Removal of JEFFREY P. THOMAS, Appellant, as Committee of NANCY C. WARNER, an Incompetent Person.

Matter of Chapman, 72 App. Div. 620, affirmed.

(Argued October 8, 1902; decided October 28, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, made May 7, 1902, which affirmed an order of Special Term in a proceeding for the removal of the committee of an incompetent person.

Charles Irving Oliver for appellant.

Arthur L. Andrews and *Buel C. Andrews* for respondent.

Order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ.

TRUST AND DEPOSIT COMPANY OF ONONDAGA, Respondent, v. TOWNSEND VERITY et al., Appellants, Impleaded with Another.

Trust & Deposit Co. of Onondaga v. Verity, 62 App. Div. 624, affirmed.
(Argued October 9, 1902; decided October 28, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 14, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Theodore E. Hancock and *James C. De La Mare* for appellants.

L. B. Williams for respondent.

Judgment affirmed, with costs; no opinion.

Concur: BARTLETT, HAIGHT, VANN and WERNER, JJ.; PARKER, Ch. J., O'BRIEN and CULLEN, JJ., dissent on the ground that errors were committed in the admission of evidence.

FREDERICK A. BUSCH, Appellant, v. LOWELL M. CUMMINGS, Respondent.

Busch v. Cummings, 57 App. Div. 636, affirmed.
(Argued October 10, 1902; decided October 28, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 4, 1901, affirming a judgment in favor of defendant entered upon a verdict directed by the court and an order denying a motion for a new trial.

Francis E. Wood and *Busch & Harvey* for appellant.

Frederick G. Mitchell for respondent.

Judgment affirmed, with costs; no opinion.

Concur: O'BRIEN, HAIGHT, VANN, CULLEN and WERNER, JJ. Not voting: PARKER, Ch. J., and BARTLETT, J.

EUNICE NIEMOLLER, Respondent, v. NAOMI DUNCOMBE, Appellant.

Niemoller v. Duncombe, 59 App. Div. 614, affirmed.
(Argued October 10, 1902; decided October 28, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 19, 1901, upon an order reversing a judgment in favor of defendant entered upon a dismissal of the complaint and directing judgment for plaintiff upon a verdict which had been set aside by the trial court.

Roger M. Sherman for appellant.

William L. Snyder for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ.

JOSEPH HAMERSCHLAG et al., Appellants, v. OSCAR DURYEA,
Respondent.

Hamerslag v. Duryea, 58 App. Div. 288, affirmed.
(Argued October 10, 1902; decided October 28, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 30, 1901, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

Edward E. Sprague and *William H. Stockwell* for appellants.

Wilson M. Powell, *John L. Cadwalader* and *Elbridge G. Duval* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, CULLEN and WERNER, JJ. Not voting: VANN, J.

JAMES GARNER WEST, Respondent, v. WILLIAM P. BANIGAN
et al., Appellants. •

West v. Banigan, 51 App. Div. 328, affirmed.
(Argued October 13, 1902; decided October 28, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 11, 1900, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Arthur S. Tompkins and *Richard S. Harvey* for appellants.

A. H. F. Seeger for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN, CULLEN and WERNER, JJ.

CARRIE A. TE BOW, Respondent, v. THE WASHINGTON LIFE
INSURANCE COMPANY, Appellant.

Te Bow v. Washington L. Ins. Co., 59 App. Div. 810, affirmed.
(Argued October 13, 1902; decided October 28, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered March 15, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury.

Augustus H. Van Buren for appellant.

Warren C. Van Slyke and *Charles W. Walton* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, CULLEN and WERNER, JJ. Absent: HAIGHT, J.

JAMES CURRAN MANUFACTURING COMPANY, Respondent, v.
THE AULTMAN & TAYLOR MACHINERY COMPANY, Appellant.

Curran Mfg. Co. v. Aultman & Taylor Co., 62 App. Div. 201, affirmed.
(Argued October 14, 1902; decided October 28, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 22, 1901, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

William H. Blymyer and *John Holden* for appellant.

John J. Delany for respondent.

Judgment affirmed, with costs, on prevailing opinion below.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT and WERNER, JJ. Not voting: MARTIN, J. Dissenting: CULLEN, J.

CHARLES S. CLARK, Appellant, v. CLIFF PAPER COMPANY,
Respondent.

Clark v. Cliff Paper Co., 55 App. Div. 625, affirmed.
(Argued October 14, 1902; decided October 28, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 7, 1901, affirming a judgment in favor of defendant entered upon a verdict and an order denying a motion for a new trial.

Frederic A. Ward for appellant.

Morris Cohn, Jr., for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN and WERNER, JJ. Not sitting: CULLEN, J.

JAMES KEEGAN et al., Respondents, v. JOHN SMITH, Appellant,
Impleaded with Others.

Keegan v. Smith, 60 App. Div. 168, affirmed.
(Argued October 14, 1902; decided October 28, 1902.)

APPEAL from a judgment entered May 22, 1901, upon an order of the Appellate Division of the Supreme Court in the first judicial department, which reversed a determination of the Appellate Term of the Supreme Court reversing a judgment in favor of plaintiff entered upon a decision of the City Court of the city of New York and affirmed such City Court judgment.

George S. Hamlin and *Andrew M. Clute* for appellant.

Dennis McMahon for respondents.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN, CULLEN and WERNER, JJ.

JOSEPH GONOROVSKY, Respondent, *v.* THE DRY DOCK, EAST BROADWAY AND BATTERY RAILROAD COMPANY, Appellant.

Gonorovsky v. Dry Dock, E. B. & B. R. R. Co., 62 App. Div. 617, affirmed.

(Argued October 14, 1902; decided October 28, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 21, 1901, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Charles F. Brown, Theodore H. Lord and Henry A. Robinson for appellant.

John J. O'Connell for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN, CULLEN and WERNER, JJ.

WILLIAM W. WEIGLEY, Respondent, *v.* SYLVESTER H. KNEELAND, Appellant.

Weigley v. Kneeland, 60 App. Div. 614, affirmed.

(Argued October 14, 1902; decided October 31, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 8, 1901, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Joseph G. Deane for appellant.

Franklin Bartlett for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN, CULLEN and WERNER, JJ.

FITZHUGH A. CHEESEBRO, Respondent, v. ANNA CORNING,
Appellant.

Cheesebro v. Corning, 61 App. Div. 612, affirmed.
(Argued October 15, 1902; decided October 31, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 8, 1901, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

John Van Voorhis and *Brown & Poole* for appellant.

George D. Reed for respondent.

Judgment affirmed, but as the court think the damages in this case are excessive and as this court cannot reverse on that account or reduce the damages, the affirmance is without costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN and CULLEN, JJ. Not voting: WERNER, J.

172 626
Case 2
78 AD 519

GEORGE SPINK, Respondent, v. ANNA CORNING, Appellant,
Impleaded with Another.

Spink v. Corning, 61 App. Div. 84, affirmed.
(Argued October 15, 1902; decided October 31, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 8, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at an Equity Term.

John Van Voorhis and *Brown & Poole* for appellant.

George D. Reed for respondent.

Judgment affirmed, but as the court think the damages in this case are excessive and as this court cannot reverse on that

account or reduce the damages, the affirmance is without costs ; no opinion.

CONCUR : PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN and CULLEN, JJ. Not voting : WERNER, J.

WILLIAM S. VAN CLIEF, Respondent, *v.* ELIZABETH R. JENKINS, Appellant, et al.

Van Clief v. Jenkins, 60 App. Div. 632, affirmed.

(Argued October 16, 1902; decided October 31, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 1, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Edward A. Alexander for appellant.

William D. Gaillard for respondent.

Judgment affirmed, with costs ; no opinion.

CONCUR : PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN, CULLEN and WERNER, JJ.

ELBERT STANNARD, Respondent, *v.* THE WHITESTONE FORGE AND CONSTRUCTION COMPANY, Appellant.

Stannard v. Whitestone F. & C. Co., 61 App. Div. 622, affirmed.

(Argued October 16, 1902; decided October 31, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 4, 1901, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Carlos C. Alden, Ingle Carpenter and *James R. Rogers* for appellant.

Albert G. McDonald for respondent.

Judgment affirmed, with costs ; no opinion.

CONCUR : PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN, CULLEN and WERNER, JJ.

JOHN T. FARLEY, Appellant, v. FREDERICK S. HOWARD,
Respondent.

Farley v. Howard, 60 App. Div. 193, affirmed.
(Submitted October 17, 1902; decided October 31, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 11, 1901, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury.

Robert L. Redfield for appellant.

Charles M. Cannon and *Wilfrid N. O'Neil* for respondent.

Judgment affirmed, with costs, on opinions of RUMSEY, J., and VAN BRUNT, P. J., below.

Concur: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN, CULLEN and WERNER, JJ.

EWALD FLEITMANN et al., Respondents, v. EUGENE L. ASHLEY
et al., Appellants, Impleaded with Another.

Fleitmann v. Ashley, 60 App. Div. 201, affirmed.
(Argued October 17, 1902; decided October 31, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 13, 1901, affirming a judgment in favor of plaintiffs entered upon a verdict directed by the court.

T. W. McArthur for appellants.

Charles H. Broas for respondents.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN, CULLEN and WERNER, JJ.

FREDERICK HOENINGHAUS et al., Respondents, v. JAMES A.
HOLDEN et al., Appellants, Impleaded with Another.

Hoeninghaus v. Holden, 60 App. Div. 618, affirmed.
(Argued October 17, 1902; decided October 31, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 13, 1901, affirming a judgment in favor of plaintiffs entered upon a verdict directed by the court.

T. W. McArthur for appellants.

Charles H. Broas for respondents.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN, CULLEN and WERNER, JJ.

GEORGE PROLE et al., Respondents, v. GEORGE F. LOWE,
Appellant.

Prole v. Lowe, 87 App. Div. 683, affirmed.
(Argued October 17, 1902; decided October 31, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 8, 1899, affirming a judgment in favor of plaintiffs entered upon a decision of the court at a Trial Term without a jury.

Frederick S. Randall for appellant.

Safford E. North for respondents.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN, CULLEN and WERNER, JJ.

**PLAYA DE ORO MINING COMPANY, Appellant, v. OTIS S. GAGE,
Respondent, Impleaded with Others.**

Playa de Oro Mining Co. v. Gage, 80 App. Div. 1, affirmed.
(Argued October 20, 1902; decided October 31, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 20, 1901, affirming a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

Richard Reid Rogers and *Paul D. Cravath* for appellant.

William M. K. Olcott and *T. B. Chancellor* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT,
HAIGHT, MARTIN and VANN, JJ.

**TERESA RICE, Respondent, v. MARVIN A. CULVER, Appellant,
and JULIUS FRIEDERICH, Respondent, Impleaded with Others.**

(Submitted October 27, 1902; decided October 31, 1902.)

Motion for reargument denied, with ten dollars costs. (See 172 N. Y. 60.)

**LYMAN A. STEVENS, Appellant, v. MARCELLUS ELECTRIC RAIL-
ROAD COMPANY et al., Respondents.**

Stevens v. Marcellus Electric R. R. Co., 57 App. Div. 637, affirmed.
(Argued October 21, 1902; decided November 11, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 4, 1901, affirming a judgment in favor of defendants entered upon the report of a referee.

Wilson, Cobb & Ryan for appellant.

William B. Crowley and *M. F. Dillon* for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT,
HAIGHT, MARTIN and VANN, JJ.

BRIDGET QUINN, as Administratrix of PATRICK P. QUINN,
Deceased, Appellant, v. WILLIAM P. BAIRD, Respondent.

Quinn v. Baird, 49 App. Div. 270, affirmed.
(Argued October 21, 1902; decided November 11, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 2, 1900, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial.

Richard T. Greene for appellant.

J. Woolsey Shepard for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT,
HAIGHT, MARTIN and VANN, JJ.

ALBERT MEISLAHN, JR., Respondent, v. IRVING NATIONAL
BANK, Appellant.

Meislahn v. Irving Nat. Bank, 62 App. Div. 281, affirmed.
(Argued October 21, 1902; decided November 11, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 1, 1901, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Grant C. Fox and *Ashbel P. Fitch* for appellant.

Charles D. Ridgway for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT,
HAIGHT, MARTIN and VANN, JJ.

MARY E. RICHARDS, Respondent, v. FRANCIS H. STILLMAN et al., Respondents, and SARAH G. WATSON, as Executrix of THOMAS H. WATSON, Deceased, Appellant.

Richards v. Stillman, 57 App. Div. 182, affirmed.

(Argued October 22, 1902; decided November 11, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 29, 1901, affirming a judgment directing the appellant herein to pay costs arising in an action to foreclose a mortgage.

Barclay E. V. McCarty and *Jared G. Baldwin, Jr.*, for appellant.

Frank M. Tichenor for plaintiff, respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ.

THE HOME BANK, Appellant, v. JOHN A. GARVER, as Assignee of J. B. BREWSTER & Co., Respondent, Impleaded with Another.

Home Bank v. Garver, 58 App. Div. 618, affirmed.

(Argued October 23, 1902; decided November 11, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 16, 1901, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

William C. Beecher, *William B. Putney*, *Henry B. Twombly* and *Richard B. Kelly* for appellant.

John A. Garver for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ.

LAURA VERITY et al., Appellants, v. MAUD M. STERNBERGER et al., Respondents.

Verity v. Sternberger, 62 App. Div. 112, affirmed.
(Argued October 23, 1902; decided November 11, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 12, 1901, affirming a judgment entered in an action to foreclose a mortgage upon a decision of the court on trial at Special Term.

James C. de La Mare for appellants.

Clifford Seasongood and *Samuel Herriman* for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ.

MARY B. LOWRY, Respondent, v. COLLATERAL LOAN ASSOCIATION, Appellant.

Lowry v. Collateral Loan Association, 62 App. Div. 617, affirmed.
(Argued October 24, 1902; decided November 11, 1902.)

APPEAL from a judgment entered July 18, 1901, upon an order of the Appellate Division of the Supreme Court in the first judicial department affirming an interlocutory judgment of Special Term overruling a demurrer to the complaint.

James C. de La Mare for appellant.

Henry G. K. Heath for respondent.

Per Curiam. This appeal presents the same questions, arising in the same way and argued at the same time as the case of John Lowry against this defendant. (172 N. Y. 394.) The complaint in each action made out a clear case for relief on the ground of usury, unless the general statute against taking interest at a rate greater than is allowed by law is repealed by implication as to corporations organized under

chapter 326 of the Laws of 1895. We apply the principle of that case to the one now before us and affirm the judgment, with costs, on our opinion in the other action.

PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ., concur.

Judgment affirmed. _____

KATE J. COLLINS, Respondent, *v.* ANDERSON FOWLER,
Appellant.

Collins v. Fowler, 62 App. Div. 614, affirmed.

(Argued October 24, 1902; decided November 11, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 12, 1901, affirming a judgment in favor of plaintiff entered upon the report of a referee.

Henry Wilson Bridges for appellant.

Howe & Hummel for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ.

MARTIN WAGNER, Appellant, *v.* THE BUFFALO AND ROCHESTER TRANSIT COMPANY, Respondent.

Wagner v. Buffalo & Rochester Transit Co., 59 App. Div. 419, affirmed.
(Argued October 27, 1902, decided November 11, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 28, 1901, affirming a judgment in favor of defendant entered upon a verdict and an order denying a motion for a new trial.

Heman W. Morris for appellant.

John D. Burns for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: GRAY, O'BRIEN, MARTIN, VANN, CULLEN and WERNER, JJ. Absent: PARKER, Ch. J.

**WILLIAM ZIEGLER, Appellant, v. WILLIAM O. BAILEY,
Respondent, Impleaded with Others.**

Ziegler v. Bailey, 62 App. Div. 623, affirmed.
(Argued October 28, 1902; decided November 11, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 28, 1901, affirming a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

James M. Fisk for appellant.

Monroe Wheeler for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: GRAY, O'BRIEN, MARTIN, VANN, CULLEN and
WERNER, JJ. Absent: Parker, Ch. J.

**THE OSWEGO COUNTY SAVINGS BANK, Appellant, v. THE TOWN
OF GENOA, Respondent.**

Oswego Co. Sav. Bank v. Town of Genoa, 66 App. Div. 380, affirmed.
(Argued October 29, 1902; decided November 11, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 26, 1901, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury.

Israel T. Deyo and *S. M. Coon* for appellant.

Frederic E. Storke for respondent.

Judgment affirmed, with costs, on opinions at Trial Term and Appellate Division.

CONCUR: GRAY, O'BRIEN, MARTIN, VANN, CULLEN and
WERNER, JJ. Absent: PARKER, Ch. J.

CHENANGO VALLEY SAVINGS BANK, Appellant, *v.* JOHN L. KING, as Railroad Commissioner of the Town of Genoa, Respondent.

Chenango Valley Sav. Bank v. King, 66 App. Div. 616, affirmed.
(Argued October 29, 1902; decided November 11, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 27, 1901, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury.

Israel T. Deyo for appellant.

Frederic E. Storke for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, O'BRIEN, MARTIN, VANN and WERNER, JJ.
Absent: PARKER, Ch. J. Dissenting: CULLEN, J.

NELLIE BERKERY, Respondent, *v.* ERIE RAILROAD COMPANY, Appellant.

Berkery v. Erie R. R. Co., 55 App. Div. 489, affirmed.
(Argued October 30, 1902; decided November 11, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 4, 1900, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

George N. Orcutt and *James H. Stevens* for appellant.

Charles J. Bissell for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, O'BRIEN, MARTIN, VANN, CULLEN and WERNER, JJ. Absent: PARKER, Ch. J.

WILLIAM E. BAIRD, Respondent, *v.* THE NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Baird v. N. Y. C. & H. R. R. Co., 64 App. Div. 14, affirmed.
(Argued October 30, 1902; decided November 11, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 2, 1901, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

L. B. Williams for appellant.

William S. Jenney for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: O'BRIEN, MARTIN, VANN, CULLEN and WERNER, JJ. Absent: PARKER, Ch. J. Not sitting: GRAY, J.

JAMES MCGUIRE, Respondent, *v.* WILLIAM J. COREY, as
President of the JOURNEYMEN BRICKLAYERS' INTERNATIONAL
PROTECTIVE UNION No. 21 of STATEN ISLAND, Appellant.

McGuire v. Corey, 63 App. Div. 619, affirmed.
(Argued October 30, 1902; decided November 11, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered July 31, 1901, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

William P. Rudd and *John C. Robinson* for appellant.

John G. Clark for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: GRAY, O'BRIEN, MARTIN, VANN, CULLEN and WERNER, JJ. Absent: PARKER, Ch. J.

HILDA MORROW, Appellant, v. WESTCHESTER ELECTRIC RAIL-
WAY COMPANY, Respondent.

Morrow v. Westchester Electric Ry. Co., 54 App. Div. 592, affirmed.
(Submitted October 10, 1902; decided November 18, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May, 31, 1901, affirming a judgment in favor of defendant entered upon a verdict.

Charles H. Young for appellant.

Charles F. Brown, Theodore H. Lord and Henry A. Robinson for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ.

ORA M. JEWELL, Appellant, v. THOMAS A. MCINTYRE et al.,
Respondents.

Jewell v. McIntyre, 63 App. Div. 396, affirmed.
(Argued October 21, 1902; decided November 18, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 28, 1901, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term.

Jacob F. Miller for appellant.

Charles F. Brown, Albert G. McDonald, Albert Rathbone, Adrian H. Joline, William J. Curtis, Francis D. Pollak and Thos. S. Ormiston for respondents.

Judgment affirmed, with costs, on opinion below.

CONCUR: GRAY, O'BRIEN, BARTLETT and HAIGHT, JJ. dissenting: PARKER, Ch. J., MARTIN and VANN, JJ.

JOSEPH BERMEL, Respondent, v. THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Appellant.

Bermel v. N. Y., N. H. & H. R. R. Co., 62 App. Div. 389, affirmed.
(Argued October 22, 1902; decided November 18, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 17, 1901, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

George Coghill and *Henry W. Taft* for appellant.

J. Bohmbach for respondent.

Judgment affirmed, with costs on opinion below.

CONCUR: PARKER, Ch. J., BARTLETT, MARTIN and VANN, JJ.; O'BRIEN, J., reads dissenting opinion, and GRAY, J., concurs; not voting, HAIGHT, J.

O'BRIEN, J. (dissenting). The plaintiff, residing and doing business in this state, purchased from a firm of dealers at Quincy Adams, in the state of Massachusetts, a granite monument of the actual value of one hundred and twenty-two dollars, to be shipped to him by the seller free on board the cars. The seller delivered the monument to the defendant to be transported to the plaintiff, and at the same time the consignor, that is, the firm that sold the monument, made out themselves the bill of lading under which the carrier was to transport the property. They filled out the blanks in the printed form, and with a rubber stamp kept by the firm for that purpose, they stamped upon or inserted in the contract with blue ink the following words: "6 Pcs. Box'd Granite Mon'm'ts, Owner's Risk Released. Valuation restricted to 40 cts. per cubic foot." These words were inserted in a blank left in the printed form for that purpose. The shippers knew that this clause inserted in the contract entitled them to a reduced rate of freight, and the property was carried by the defendant at such reduced rates. It is alleged in the complaint that the property while being transported by the defendant was so injured by a collision as to be worthless to the

plaintiff and a total loss, and that such collision and loss was the result of the defendant's negligence. The defendant does not deny these allegations, but insists that it is not liable for the loss beyond the value inserted in the bill of lading, which, it is conceded, amounts to only twenty-nine dollars.

The question, therefore, presented by the appeal is with respect to this limitation contained in the bill of lading upon the plaintiff's right of recovery. In other words, the question is whether he can recover the full value of the property or only the value named in the restriction inserted in the contract. It will be seen that the bill of lading was procured, not by the plaintiff, who was the consignee, but by the seller, who was the consignor. The consignor, in order to obtain the reduced rate of freight, deliberately and advisedly inserted the restriction in the bill of lading. There is no real question in the case as to any mistake, inadvertence or fraud in the insertion of this restriction in the contract. It was the deliberate act of the shipper in order to give him the benefit of a reduction in freight. The bill of lading, on its face, contained the following stipulation: "It is mutually agreed, in consideration of the rate of freight hereinafter named as to each carrier of all or any of said property over all or any portion of said route to destination as to each party at any time interested in all or any of said property that every service to be performed herein shall be subject to all the conditions whether printed or written hereon contained and which are hereby agreed to by the shipper and by him accepted for himself and his assigns as just and reasonable. * * * The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation."

The seller and consignor of goods, in the absence of proof to the contrary, has authority to make special contracts with the carrier as to the terms of shipment which will bind the consignee. The carrier is not bound to inquire as to the con-

signor's authority, but is entitled to assume that it exists. If the seller or consignor, acting for the consignee, exceeds his authority in consenting to limitations upon the carrier's liability, the carrier cannot be made to suffer thereby unless actual notice of such fact is brought home to him. Therefore, the clause inserted by the shipper in the bill of lading bound the plaintiff to whom the goods were consigned. (*Donovan v. Standard Oil Co.*, 155 N. Y. 112.)

It is now well settled that where a shipper of property enters into a contract with a common carrier whereby, in consideration of an agreement of the latter to transport the property at reduced rates, it is stipulated that in the event of loss or injury resulting from causes which would make the carrier liable the liability will be limited to an amount not exceeding a valuation specified, the shipper in case of loss or injury is not entitled to recover more than the sum specified, and that it is incumbent upon the shipper to acquaint himself with the contents of the contract executed by him, and in case he fails to do so he will be held chargeable with knowledge thereof. (*Magnin v. Dinsmore*, 70 N. Y. 410; *Hart v. Penn. R. R. Co.*, 112 U. S. 331; *Zimmer v. N. Y. C. & H. R. R. Co.*, 137 N. Y. 460; *Graves v. L. S. & M. S. R. R. Co.*, 137 Mass. 33.) Such a limitation in the bill of lading will protect the carrier even though the loss or injury is the result of negligence. It will be seen from the cases cited that the question is not now an open one in this court. The only remaining question is whether the limitation is expressed in appropriate terms or with such clearness as to bind all the parties interested? If the limitation in this case is not clearly expressed, it is quite obvious that it must have been the fault of the shipper and not of the defendant. The shipper was at liberty to express the terms of the contract in this respect in his own language, and the shipper being the agent or representative of the consignee, to ship the goods in the customary form and with the customary bill of lading, could bind the latter as between him and the carrier so that even if the restriction as to value was not clearly expressed it is difficult to see how either the shipper or the consignee could complain, but there is in fact no ambiguity

or want of clearness in the words of the restriction. The words "Valuation restricted to forty cents per cubic foot" are so plain and clear that no one could fail to mistake their meaning. They obviously meant and were so understood by the shipper to restrict the value to be placed upon the property to a certain sum in case it was lost from any cause for which the defendant was responsible, even though that cause was its own negligence. No one had a clearer notion of the importance of this restriction than the shipper himself who inserted it in the contract. He knew from his own experience as a shipper and from the custom of the business that by inserting the restriction he would procure a material reduction in the compensation of the carrier, and of course knew that he could not obtain that advantage for himself or his consignee without some corresponding benefit to the defendant. It seems to us that the contract was fairly made and conforms to the intention of the parties and should be enforced like other contracts; so the judgment should be modified by reducing the recovery to twenty-nine dollars, which is conceded to be the valuation of the property under the restriction in the bill of lading, and as so modified, should be affirmed, with costs to the defendant in this court.

THE UTICA CITY NATIONAL BANK, Respondent, v. GERTRUDE
L. TALLMAN, Appellant.

Utica City Nat. Bank v. Tallman, 63 App. Div. 480, affirmed.
(Argued October 28, 1902; decided November 18, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered August 13, 1901, affirming a judgment in favor of plaintiff entered upon the report of a referee.

Barclay E. V. McCarty for appellant.

William P. Quin for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT,
HAIGHT, MARTIN and VANN, JJ.

ALBERT LILIENTHAL et al., Respondents, v. JOHN F. BETZ et al., Appellants, Impleaded with Others.

Lilienthal v. Betz, 81 App. Div. 601, affirmed.
(Argued October 24, 1902; decided November 18, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 21, 1901, affirming a judgment in favor of plaintiffs entered upon a verdict directed by the court and an order denying a motion for a new trial.

Abram I. Elkus, James C. McEachen and Joseph M. Proskauer for appellants.

Harold Nathan for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, MARTIN and VANN, JJ. Absent: HAIGHT, J.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant and Respondent, v. GEORGE BISSEET, Respondent and Appellant.

People v. Bissert, 71 App. Div. 118, affirmed.
(Argued October 31, 1902; decided November 18, 1902.)

CROSS-APPEALS from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 11, 1902, which reversed a judgment of the Court of General Sessions of the Peace in the county of New York entered upon a verdict convicting the defendant of the crime of bribery, affirmed an order of said Court of General Sessions denying defendant's motion for a new trial, in so far as the same is based upon questions of fact, and dismissed an appeal from an order of said court denying defendant's motion in arrest of judgment.

William Travers Jerome, District Attorney (*Howard S. Gans* of counsel), for plaintiff, appellant and respondent.

J. Rider Cady, *H. C. Henderson*, *F. B. House* and *L. G. Vorhaus* for defendant, respondent and appellant.

Order affirmed ; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, MARTIN, VANN, CULLEN and WERNER, JJ. GRAY, J., concurs upon the sole ground that it was prejudicial error to receive the evidence of the witness Drexler as to the conversation between the complainant and the defendant.

GEORGE S. INGRAHAM et al., Appellants, v. NATIONAL SALT COMPANY et al., Respondents.

Ingraham v. National Salt Co., 72 App. Div. 582, appeal dismissed. (Argued November 11, 1902; decided November 18, 1902.)

APPEAL from a judgment entered July 1, 1902, upon an order of the Appellate Division of the Supreme Court in the second judicial department, affirming an interlocutory judgment of Special Term sustaining demurrers to the complaint.

George S. Ingraham for appellants.

W. B. Putney, *Henry B. Twombly* and *Charles W. Pierson* for respondents.

Appeal dismissed, with costs ; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and CULLEN, JJ. Absent: VANN, J.

ELIZABETH MOELLER, as Administratrix of the Estate of PAUL MOELLER, Deceased, Appellant, v. THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Respondent.

Moeller v. Delaware, L. & W. R. R. Co., 55 App. Div. 636, appeal dismissed.

(Argued November 14, 1902; decided November 18, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered

November 28, 1900, which reversed a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial and granted a new trial.

Smith M. Lindsley and *William S. Mackie* for appellant.

Leslie W. Kernan for respondent.

Appeal dismissed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and CULLEN, JJ.

LAURA A. WEIANT, Respondent, *v.* THE ROCKLAND LAKE
TRAP ROCK COMPANY et al., Appellants.

Reported below, 61 App. Div. 883.

(Argued November 10, 1902; decided November 18, 1902.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 8, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The motion was made upon the grounds that the appeal is unauthorized and the exceptions taken upon the trial are frivolous.

Jonathan W. Sherwood for motion.

Wilson Brown, Jr., opposed.

Motion denied, with ten dollars costs.

ADOLPH GOLDMARK, Respondent, *v.* THE MAGNOLIA ANTI-FRICTION METAL COMPANY, Appellant, Impleaded with Another.

Reported below, 71 App. Div. 617.

(Submitted November 10, 1902; decided November 18, 1902.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 15, 1902, affirming a judgment in

favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The motion was made upon the grounds that the exceptions are frivolous and the appeal taken for delay.

L. A. Gould for motion.

Alexander S. Bacon opposed.

Motion denied, with ten dollars costs.

ROBERT FLAHERTY, Appellant, v. CLARENCE CARY et al.,
Respondents.

Reported below, 62 App. Div. 116.

(Argued November 10, 1902; decided November 18, 1902.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 22, 1901, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term.

The motion was made upon the grounds that the action is to recover for services or damages for breach of contract therefor, and the judgment of the trial court dismissing the complaint having been unanimously affirmed by the Appellate Division, no appeal lies from that judgment to this court.

Sanford Robinson for motion.

Archibald Douglass opposed.

Motion denied, with ten dollars costs.

ROBERT FLAHERTY, Appellant, v. JOHN W. MURRAY,
Defendant, and TITLE GUARANTEE AND TRUST COMPANY,
Respondent.

Flaherty v. Murray, 60 App. Div. 92, appeal dismissed.

(Argued November 10, 1902; decided November 18, 1902.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial

department, entered April 22, 1901, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term.

The motion was made upon the grounds that the decision of the Appellate Division was unanimous and leave to appeal therefrom had not been granted.

Harold Swain for motion.

A. S. Gilbert opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

JOHANNA KALISH et al., as Executors of JOSEPH KALISH, Deceased, Appellants, v. LUKE HIGGINS et al., Respondents.

Reported below, 70 App. Div. 192.

(Argued November 10, 1902; decided November 18, 1902.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 8, 1902, reversing a judgment in favor of plaintiffs entered upon a verdict and granting a new trial.

The motion was made upon the ground that the only question involved was one of fact which is not reviewable by the Court of Appeals.

M. J. Horan for motion.

Edward O. Orrell, Jr., opposed.

Motion denied, with ten dollars costs.

JOHANNA KALISH et al., as Executors of JOSEPH KALISH, Deceased, Appellants, v. LUKE HIGGINS et al., Respondents.

Reported below, 70 App. Div. 613.

(Argued November 10, 1902; decided November 18, 1902.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the first judicial

department, entered April 8, 1902, reversing a judgment in favor of plaintiffs entered upon a decision of the court at a Trial Term without a jury and granting a new trial.

The motion was made upon the ground that the only question involved was one of fact which is not reviewable by the Court of Appeals.

M. J. Horan for motion.

Edward O. Orrell, Jr., opposed.

Motion denied, with ten dollars costs.

GEORGE H. MINOR, Respondent, *v.* ERIE RAILROAD COMPANY,
Appellant.

(Submitted November 10, 1902; decided November 18, 1902.)

Motion for reargument denied, with ten dollars costs. (See 171 N. Y. 566.)

In the Matter of the Appraisal, under the Transfer Tax Act,
of the Estate of JOHN D. BREZ, Deceased.

THE COMPTROLLER OF THE STATE OF NEW YORK, Appellant;
JULES RACINE et al., as Executors, etc., Respondents.

(Submitted November 10, 1902; decided November 18, 1902.)

Motion for reargument denied, with ten dollars costs. (See 172 N. Y. 609.)

In the Matter of the Accounting of JOSEPH GORDEN et al., as
Executors of and Trustees under the Will of WILLIAM
GORDEN, Deceased.

JOSEPH GORDEN et al., as Executors, etc., et al., Appellants;
SUSAN GORDEN, Respondent.

(Submitted November 10, 1902; decided November 18, 1902.)

Motion for reargument denied, with ten dollars costs. (See 172 N. Y. 25.)

FREDERICK REICHERT, Respondent, *v.* CHARLOTTE M. STILWELL, as Administratrix of CHARLES A. STILWELL, Deceased, et al., Appellants.

(Submitted November 10, 1902; decided November 18, 1902.)

MOTION to amend remittitur. (See 172 N. Y. 83.)

Motion granted and remittitur to have inserted in it the words "against Charlotte M. Stilwell, as administratrix of the goods, chattels and credits of Charles A. Stilwell, deceased."

THE PEOPLE OF THE STATE OF NEW YORK ex rel. CHARLES R. BATT et al., Respondents, *v.* HARVEY C. WEST et al., as Assessors of the Town of Madrid, Appellants.

People ex rel. Batt v. West, 66 App. Div. 617, affirmed.

(Argued November 10, 1902; decided November 25, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered November 20, 1901, which affirmed an order of Special Term reducing an assessment upon the real property of the relator.

Vasco P. Abbott and *F. J. Merriman* for appellants.

John P. Badger for respondents.

Order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and CULLEN, JJ.

In the Matter of the Appraisal, under the Transfer Tax Act, of the Estate of FRANCES L. BUSHNELL, Deceased.

MARY B. CHENEY et al., as Executors, etc., et al., Appellants;
THE COMPTROLLER OF THE STATE OF NEW YORK, Respondent.

Matter of Bushnell, 73 App. Div. 325, affirmed.

(Submitted November 10, 1902; decided November 25, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 6, 1902, affirming an order of the New York County Surro-

gate's Court assessing a transfer tax upon the estate of Frances L. Bushnell, deceased.

E. H. Benn and *E. Luther Hamilton* for appellants.

Samuel Herman for respondent.

Order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and CULLEN, JJ.

In the Matter of the Application of ROBERT CLIFFORD, Appellant, for a Writ of Certiorari against BERNARD J. YORK et al., as Police Commissioners of the City of New York, Respondents.

People ex rel. Clifford v. York, 60 App. Div. 680, appeal dismissed. (Argued November 10, 1902; decided November 25, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 14, 1901, which affirmed an order of Special Term dismissing a writ of certiorari to review a determination of the defendants denying an application of petitioner for reinstatement in the office of patrolman in the police force of the city of New York.

Edward D. O'Brien and *Louis Hanneman* for appellant.

George L. Rives, Corporation Counsel (*Theodore Connolly* and *Terence Farley* of counsel), for respondents.

Appeal dismissed, with costs; no opinion.

CONCUR: PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN, VANN and CULLEN, JJ. Not sitting: O'BRIEN, J.

In the Matter of the Application of CAROLINE SMITH, as General Guardian of ELIZABETH ROESSNER, an Infant, Respondent, v. LAWRENCE P. MINGEY, Appellant.

Matter of Smith v. Mingey, 72 App. Div. 108, affirmed. (Submitted November 11, 1902; decided November 25, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May

26, 1902, which affirmed an order of Special Term directing the appellant herein to pay to Elizabeth Roessner a certain sum of money found to be due to her from him.

George H. Balkam and *Thomas J. Purdy* for appellant.

Lawrence E. Brown for respondent.

Order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and CULLEN, JJ. Absent: VANN, J.

In the Matter of the Administration of the Estate of WILLIAM
H. SWALES, Deceased.

MARY E. SWALES, Appellant; JOSEPH G. SWALES, as Administrator, etc., Respondent.

172	651
e173	506

Matter of Swales, 60 App. Div. 599, affirmed.

(Submitted November 11, 1902; decided November 25, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 30, 1901, which reversed a decree of the Wayne County Surrogate's Court declaring the petitioner entitled to administer the estate of William E. Swales, deceased, and revoking letters of administration theretofore issued to Joseph G. Swales and denied the petition.

S. B. McIntyre for appellant.

Edson W. Hamm for respondent.

Order affirmed, with costs, on opinion below.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and CULLEN, JJ. Absent: VANN, J.

In the Matter of the Accounting of ANN HAMILTON, as Administratrix of WILLIAM HAMILTON, Deceased.

ANN HAMILTON, Individually and as Administratrix, etc., Respondent; JAMES HAMILTON et al., Appellants.

Matter of Hamilton, 70 App. Div. 73, affirmed.

(Argued November 11, 1902; decided November 25, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, made March 7, 1902, which modified and affirmed as modified a decree of the New York County Surrogate's Court settling the account of Ann Hamilton, as administratrix of the estate of William Hamilton, deceased.

Arthur C. Rounds for appellants.

George Finck and *Frank W. Hubby, Jr.*, for respondent.

Order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and CULLEN, JJ. Absent: VANN, J.

ARNON LYON SQUIERS, as Executor of CAROLINE WYLIE SQUIERS, Deceased, Respondent, v. EDWARD THOMPSON, Appellant, Impleaded with Others.

Squiers v. Thompson, 73 App. Div. 552, affirmed.

(Argued November 11, 1902; decided November 25, 1902.)

APPEAL from a judgment entered in favor of plaintiff, August 7, 1902, upon an order of the Appellate Division of the Supreme Court in the second judicial department, affirming an interlocutory judgment of Special Term overruling a demurrer to the complaint.

John L. Hill for appellant.

Edward P. Lyon for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and CULLEN, JJ. Absent: VANN, J.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THEODORE H. NEWLAND, Appellant; v. ERNST J. LEDERLE, Commissioner of the Board of Health of the City of New York, Respondent.

People ex rel. Newland v. Lederle, 74 App. Div. 631, appeal dismissed. (Argued November 12, 1902; decided December 2, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 21, 1902, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus to compel defendant to reinstate the relator in employment in the department of health of the city of New York.

Michael A. Quinlan for appellant.

George L. Rives, Corporation Counsel (*Theodore Connolly* of counsel), for respondent.

Appeal dismissed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and CULLEN, JJ. Absent: VANN, J.

IN the Matter of the Application of the MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK to Acquire Title to Land for the Purpose of Opening Fordham Road. JOHN B. HASKIN, JR., Appellant; THE CITY OF NEW YORK, Respondent.

Matter of Mayor, etc., of New York, 74 App. Div. 843, appeal dismissed. (Argued November 12, 1902; decided December 2, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered August 6, 1902, which modified, and affirmed as modified, an order of Special Term denying an application to vacate proceedings for the acquisition of certain real estate in the city

of New York, and confirming the report of commissioners of estimate and assessment.

Abel Crook for appellant.

George L. Rives, Corporation Counsel (Theodore Connoly, John P. Dunn and Thomas C. Blake of counsel), for respondent.

Appeal dismissed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and CULLEN, JJ. Absent: VANN, J.

MARIE E. JACOBSON, Appellant, *v.* ELIZABETH SMITH et al.,
Respondents.

Jacobson v. Smith, 73 App. Div. 412, appeal dismissed.
(Argued November 12, 1902; decided December 2, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 30, 1902, which modified, and affirmed as modified, an order of Special Term denying a motion to vacate and set aside a sale of real property under a judgment in foreclosure.

Charles F. Brown for appellant.

James MacGregor Smith and George W. Pearsall for respondents.

Appeal dismissed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and CULLEN, JJ. Absent: VANN, J.

In the Matter of the Application of the DEPARTMENT OF PUBLIC WORKS OF THE CITY OF NEW YORK to Acquire Title to Land for the Construction of the Jerome Avenue Approach to the New Macomb's Dam Bridge.

EUPHEMIA A. HAWES, as Executrix of GRANVILLE P. HAWES, Deceased, et al., Appellants; MARY HYNES, Respondent.

Matter of Jerome Avenue, 72 App. Div. 619, affirmed.

(Argued November 12, 1902; decided December 2, 1902.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 27, 1902, which affirmed an order of Special Term denying a motion to vacate and cancel a judgment for costs entered upon an order of the Appellate Division.

The following question was certified: "Does the unreversed and unmodified order herein that was entered in the office of the clerk of New York county on July 5, 1901, require that the judgment for costs on the intermediate appeal, in the sum of \$448.43, entered herein, in said clerk's office, on April 26, 1901, in favor of the respondent and against the appellants personally, be vacated and canceled of record, or entitle the appellants to an order to that effect; it further appearing that, pending the appeal to the Court of Appeals, and prior to its decision thereon, the fund from which the remittitur of that court directed that such costs be deducted had been wholly disbursed for expenses of the proceeding, other than said costs by stipulation of the attorneys for the respective parties, without any express reservation or agreement concerning said costs or judgment?"

Barclay E. V. McCarty and *Jared G. Baldwin, Jr.*, for appellants.

John J. Hynes and *Joseph A. Flannery* for respondent.

Order affirmed, with costs, and question certified answered in the negative; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and CULLEN, JJ. Absent: VANN, J.

CAROLINA STIASNY, as Committee of ALBERT E. STIASNY, a Lunatic, Appellant, *v.* METROPOLITAN STREET RAILWAY COMPANY, Respondent.

Stiasny v. Metropolitan Street Ry. Co., 58 App. Div. 172, affirmed.
(Submitted November 14, 1902; decided December 2, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 21, 1901, affirming a judgment in favor of defendant entered upon a verdict and an order denying a motion for a new trial.

Franklin Pierce and *Edwin C. Dusenbury* for appellant.

Charles F. Brown, *Theodore H. Lord* and *Henry A. Robinson* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and CULLEN, JJ.

EMERSON ORVIS, Appellant, *v.* THE ELMIRA, CORTLAND AND NORTHERN RAILROAD COMPANY, Respondent.

Orvis v. Elmira, C. & N. R. R. Co., 17 App. Div. 187, affirmed.
(Submitted November 14, 1902; decided December 2, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered December 2, 1898, affirming a judgment in favor of defendant entered upon a verdict and an order denying a motion for a new trial.

H. H. Rockwell for appellant.

Frederick Collin for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and CULLEN, JJ.

THE SECOND NATIONAL BANK OF CORTLAND, Appellant, v.
PARMELIA C. COLE et al., as Executors of A. LE ROY COLE,
Deceased, Respondents, Impleaded with Others.

Second Nat. Bank of Cortland v. Cole, 45 App. Div. 629, affirmed.
(Argued November 17, 1902; decided December 2, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered July 27, 1901, affirming a judgment in favor of defendant entered upon a verdict directed by the court and an order denying a motion for a new trial.

Nathan L. Miller for appellant.

O. U. Kellogg for respondents.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN, VANN and WERNER, JJ.

ANDREW J. CARPENTER, Respondent, v. LEWIS BOUTON et al.,
as Executors of ROBERT PURVIS, Deceased, Appellants.

Carpenter v. Purvis, 57 App. Div. 629, affirmed.
(Argued November 17, 1902; decided December 2, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered August 12, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

S. D. Halliday and *George E. Goodrich* for appellants.

O. U. Kellogg and *J. E. Winslow* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN, VANN and WERNER, JJ.

AMOS J. RICHARDSON, Appellant, *v.* ALICE RHINES et al.,
Respondents.

Richardson v. Rhines, 43 App. Div. 624, affirmed.
(Argued November 17, 1902; decided December 2, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 23, 1899, affirming a judgment in favor of defendants entered upon a verdict and an order denying a motion for a new trial.

Amos J. Richardson for appellant.

William L. Barnum for respondents.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT,
MARTIN, VANN and WERNER, JJ.

FLORENCE B. SCHWAMAN, Respondent, *v.* EDGAR I. TRUAX
et al., Appellants.

Schwaman v. Truax, 53 App. Div. 626, affirmed.
(Argued November 17, 1902; decided December 2, 1902.)

APPEAL from a judgment entered February 26, 1901, upon an order of the Appellate Division of the Supreme Court in the third judicial department, affirming an interlocutory judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Charles E. Patterson, *A. J. Dillingham* and *Charles C. Van Kirk* for appellants.

Judson S. Landon, *Robert J. Landon* and *John F. Clute*
for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., BARTLETT, HAIGHT, VANN and
WERNER, JJ. Not voting: GRAY and MARTIN, JJ.

JENNIE LOUIS, Respondent, v. CONNECTICUT MUTUAL LIFE
INSURANCE COMPANY, Appellant.

Louis v. Connecticut Mut. L. Ins. Co., 58 App. Div. 137, affirmed.
(Argued November 18, 1902; decided December 2, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 7, 1901, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Charles F. Brown and *John M. Bowers* for appellant.

Gibson Putzel for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., HAIGHT, MARTIN, VANN and
WERNER, JJ. Dissenting: GRAY and BARTLETT, JJ.

JAMES C. MURPHY, Appellant, v. SUPREME COUNCIL OF THE
CATHOLIC MUTUAL BENEFIT ASSOCIATION, Respondent.

Murphy v. Supreme Council C. M. B. A., 51 App. Div. 618, appeal dismissed.

(Submitted November 10, 1902; decided December 2, 1902.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 3, 1900, affirming a judgment in favor of defendant entered upon a verdict directed by the court.

The motion was made upon the ground that the appellant was in default in having failed to pay certain costs which he had been directed to pay by a previous order of this court.

John J. Hynes for motion.

Edmund P. Cottle opposed.

Motion granted and appeal dismissed, without costs of appeal, but with ten dollars costs of motion.

ANDREW J. HOLCOMB, Respondent, *v.* CHARLES W. HARRIS,
as Executor of EDMUND S. HARRIS, Deceased, Appellant.

Holcomb v. Harris, 41 App. Div. 617, appeal dismissed.
(Submitted December 1, 1902; decided December 2, 1902.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered July 14, 1902, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The motion was made upon the ground that the judgment of the Appellate Division was unanimous; that said court had refused an application for leave to appeal to the Court of Appeals, and that more than thirty days had elapsed after service of a copy of the order denying such application before the appellant applied to a judge of the Court of Appeals for leave to appeal.

James Lansing for motion.

John T. Norton opposed.

Motion granted and appeal dismissed, with costs, and ten dollars costs of motion.

GEORGE W. MILLS, Respondent, *v.* THE THOMAS ELEVATOR
COMPANY, Appellant.

Mills v. Thomas Elevator Co., 54 App. Div. 114, affirmed.
(Argued November 19, 1902; decided December 9, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 29, 1900, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Arthur C. Rounds for appellant.

Thomas F. Magner for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT,
MARTIN, VANN and WERNER, JJ.

SILAS HEYSER et al., Appellants, v. CHARLES G. PETERSON,
Respondent.

Heyser v. Peterson, 63 App. Div. 620, affirmed.

(Argued November 20, 1902; decided December 9, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered August 5, 1901, affirming a judgment in favor of defendant entered upon a decision of the court at a Trial Term without a jury.

Alexander S. Bacon for appellants.

James P. Philip and *J. Stewart Ross* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT,
MARTIN, VANN and WERNER, JJ.

THE NEW YORK MILK PRODUCTS COMPANY, Respondent, v.
HIRAM A. DAMON et al., Appellants.

N. Y. Milk Products Co. v. Damon, 57 App. Div. 261, affirmed.

(Submitted November 20, 1902; decided December 9, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered April 26, 1901, reversing a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term and granting a new trial.

Frank W. Stevens for appellants.

James C. Sheldon and *B. F. Congdon* for respondent.

Order affirmed and judgment absolute ordered for plaintiff on the stipulation, with costs, on opinion below.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN, VANN and WERNER, JJ.

HYMAN H. GINSBURG, as Trustee, Respondent, *v.* AREND H.
VON SEGGERN, Appellant.

Ginsburg v. Von Seggern, 59 App. Div. 595, affirmed.
(Argued November 20, 1902; decided December 9, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 16, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury and an order denying a motion for a new trial.

Edward W. S. Johnston for appellant.

Benjamin Tuska and *Moses R. Ryttenberg* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN, VANN and WERNER, JJ.

PRESIDENT, DIRECTORS AND FIRST COMPANY OF THE GREAT
WESTERN TURNPIKE COMPANY, Appellant, *v.* MARTIN L.
SHAFFER, Respondent.

Great Western Turnpike Co. v. Shafer, 57 App. Div. 331, affirmed.
(Argued November 21, 1902; decided December 9, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 15, 1901, which affirmed a judgment of the Albany County Court affirming a judgment in favor of defendant entered upon a decision of the City Court of Albany.

Frederick Townsend for appellant.

P. E. Du Bois for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN, VANN and WERNER, JJ.

JACOB KAISER, Respondent, v. HAMBURG-BREMEN FIRE INSURANCE COMPANY, Appellant, Impleaded with Others.

Kaiser v. Hamburg-Bremen F. Ins. Co., 59 App. Div. 525, affirmed.
(Submitted November 24, 1902; decided December 9, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 22, 1901, affirming a judgment in favor of plaintiff entered upon the report of a referee.

Seward A. Simons for appellant.

Moses Shire for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, MARTIN, VANN, CULLEN and WERNER, JJ.

JACOB KAISER, Respondent, v. BRITISH AMERICA ASSURANCE COMPANY, TORONTO, CANADA, Appellant, Impleaded with Others.

Kaiser v. British America Assurance Co., 59 App. Div. 625, affirmed.
(Submitted November 24, 1902; decided December 9, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 22, 1901, affirming a judgment in favor of plaintiff entered upon the report of a referee.

Seward A. Simons for appellant.

Moses Shire for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, MARTIN, VANN, CULLEN and WERNER, JJ.

JACOB KAISER, Respondent, *v.* SVEA ASSURANCE COMPANY OF
GOTHENBURG, SWEDEN, Appellant, Impleaded with Others.

Kaiser v. Svea Assurance Co., 59 App. Div. 625, affirmed.
(Submitted November 24, 1902; decided December 9, 1902.)

APPEAL from a judgment of the Appellate Division of the
Supreme Court in the fourth judicial department, entered
March 22, 1901, affirming a judgment in favor of plaintiff
entered upon the report of a referee.

Seward A. Simons for appellant.

Moses Shire for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, MARTIN, VANN,
CULLEN and WERNER, JJ.

JACOB KAISER, Respondent, *v.* FIRE ASSOCIATION OF PHILA-
DELPHIA, Appellant, Impleaded with Others.

Kaiser v. Fire Association of Philadelphia, 59 App. Div. 625, affirmed.
(Submitted November 24, 1902; decided December 9, 1902.)

APPEAL from a judgment of the Appellate Division of the
Supreme Court in the fourth judicial department, entered
March 22, 1901, affirming a judgment in favor of plaintiff
entered upon the report of a referee.

Seward A. Simons for appellant.

Moses Shire for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, MARTIN, VANN,
CULLEN and WERNER, JJ.

JAMES H. HOOKER, Appellant, v. THE CITY OF ROCHESTER
et al., Respondents.

Hooker v. City of Rochester, 57 App. Div. 530, affirmed.

(Argued November 24, 1902; decided December 9, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 4, 1901, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term.

Eugene Van Voorhis for appellant.

William A. Sutherland for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, MARTIN, VANN,
CULLEN and WERNER, JJ.

HELENA DEUBLE, Respondent, v. THE GRAND LODGE OF THE
ANCIENT ORDER OF UNITED WORKMEN OF THE STATE OF
NEW YORK, Appellant.

Deuble v. Grand Lodge, A. O. U. W., 66 App. Div. 323, affirmed.

(Argued November 24, 1902; decided December 9, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 15, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury.

William F. Lynn for appellant.

Forsyth Brothers for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, MARTIN, VANN,
CULLEN and WERNER, JJ.

**MALACHI FARRELL, Appellant, v. CITY OF MIDDLETOWN,
Respondent.**

Farrell v. City of Middletown, 56 App. Div. 525, reversed.
(Argued November 25, 1902; decided December 9, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered April 16, 1901, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial.

William Vanamee and *Thomas Watts* for appellant.

W. T. Shaw and *W. F. O'Neill* for respondent.

Per Curiam. We are of the opinion that the evidence presented a question of fact as to the negligence of the defendant, which the court should have submitted to the jury, and that it erred in nonsuiting the plaintiff upon that ground.

The judgment should be reversed and a new trial granted, with costs to abide the event.

PARKER, Ch. J., GRAY, O'BRIEN, MARTIN, VANN, CULLEN and WERNER, JJ., concur.

Judgment reversed, etc.

**FRANCIS X. ZAPF, Appellant, v. LULU N. CARTER, Respond-
ent, Impleaded with Others.**

Reported below, 70 App. Div. 395.
(Submitted December 8, 1902; decided December 9, 1902.)

MOTION to dismiss an appeal by permission from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 22, 1902, reversing an interlocutory judgment in favor of plaintiff entered upon the report of a referee.

The motion was made upon the ground that the return on

appeal was imperfect in that it does not contain a true copy of the judgment appealed from.

George C. Carter for motion.

John Conboy opposed.

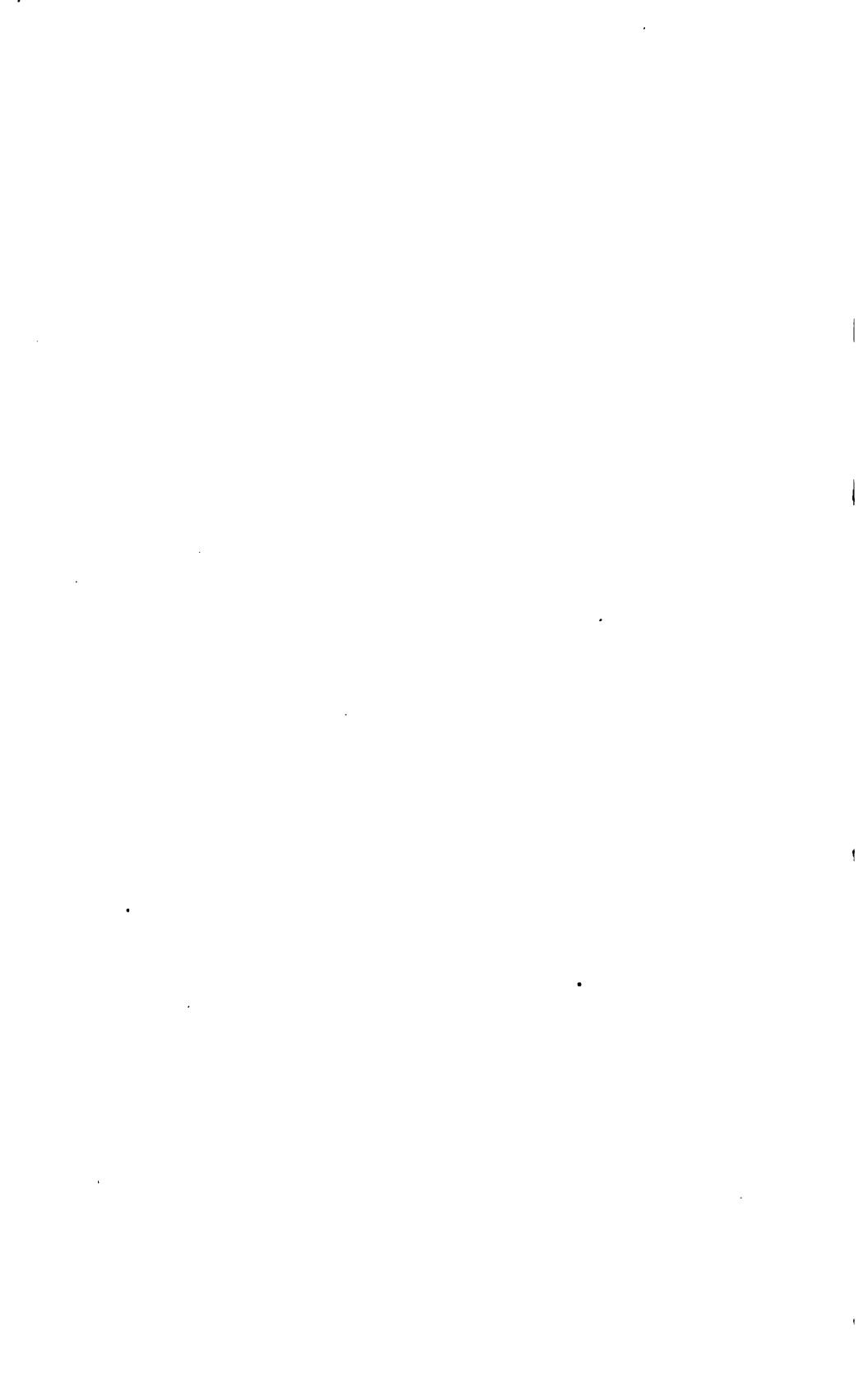
Motion denied, with ten dollars costs.

In the Matter of the Application of the GREENWICH AND JOHNSONVILLE RAILWAY COMPANY, Appellant, v. THE GREENWICH AND SCHUYLERVILLE ELECTRIC RAILROAD et al., Defendants.

THE HUDSON VALLEY RAILWAY COMPANY, Respondent.

(Submitted December 1, 1902; decided December 9, 1902.)

Motion for reargument denied, with ten dollars costs. (See 172 N. Y. 462.)



INDEX.

ACCOUNTING.

Judicial settlement of administrator's accounts void as against interested parties not cited or appearing thereon.

See SURROGATE'S COURT, 1, 2.

ACTIONS.

Default in payment of installments of rent—when action cannot embrace damages for a total breach of lease.

See LANDLORD AND TENANT, 2.

Action to foreclose mortgage, after foreclosure of another mortgage on other property given in part as collateral security for debt secured by first mortgage, not prohibited by sections 1628 and 1630 of the Code of Civil Procedure.

See MORTGAGE.

When court may order compulsory reference in common-law action brought by executor or administrator.

See PRACTICE, 1.

AFFIRMANCE.

Unanimous, by Appellate Division—when disputed facts deemed settled by.

See APPEAL, 2.

Unanimous, by Appellate Division—when does not preclude Court of Appeals from considering evidence.

See APPEAL, 5.

Unanimous, by Appellate Division, of judgment entered upon verdict, when not reviewable by Court of Appeals.

See APPEAL, 6.

AGENCY.

Bank as collecting agent—duty of.

See BANKING, 2-6.

ALDERMEN.

Power of board of, to elect its own officers and appointees.

See NEW YORK (CITY OF), 8.

ALIBI.

Fugitive from justice.

See EXTRADITION, 7.

AMENDMENT.

Of by-laws of mutual benefit society—when unreasonable.

See ASSOCIATIONS, 1.

APPEAL.

1. *From Judgment, only, after Denial of Motion for New Trial—Appellate Division Has no Power to Review or Reverse upon the Facts.* Where, in the trial of an action before a jury, after the granting of a motion dismissing the complaint at the close of plaintiff's case, to which no exception was taken, a motion for a new trial, made without specifying any grounds, was denied, but no order was entered and no foundation laid for an appeal therefrom, the Appellate Division, upon an appeal from the judgment

APPEAL — Continued.

dismissing the complaint, has no power to review or reverse upon the facts, and where there are no exceptions taken to rulings relating to the admission or exclusion of evidence that would authorize the reversal of the judgment of the trial court, the Court of Appeals must reverse the order of the Appellate Division and affirm the judgment of the trial court. *Collier v. Collins.* 99

2. *Unanimous Affirmance — Disputed Facts.* Upon unanimous affirmance below of the judgment recovered by a party, the disputed facts will be deemed to be settled in his favor. *Nat. Revere Bank v. Nat. Bank of Republic.* 102

3. *Objection Urged for First Time.* A defense in an action against a bank which failed to collect or to charge the indorser upon paper sent to it for collection that the paper may not have been actually indorsed or that the indorsement may have been without recourse or with waiver of protest cannot be urged for the first time on appeal. *Id.*

4. *Question of Law.* It seems, that the determination upon evidence of a public improvement commission, authorized to construct curbing wherever it deems the same necessary and whenever in its judgment the public convenience requires it, that water often permeated between the layers of blue stone causing the stones to crack when a frost occurred, to replace an existing curb of blue stone with one of granite, gives rise to no question of law reviewable by the Court of Appeals on appeal from an order confirming the proceedings of the commission, on their review under a writ of certiorari. *People ex rel. North v. Featherstonhaugh.* 112

5. *Question of Law — Direction of Verdict.* The unanimous affirmance by the Appellate Division of a judgment, entered upon a verdict directed on uncontroverted evidence, does not preclude the Court of Appeals from considering whether the evidence justified the direction of the verdict. *Second Nat. Bank v. Weston.* 250

6. *Unanimous Affirmance — Evidence to Support Verdict.* After unanimous affirmance by the Appellate Division of a judgment entered upon a verdict of a jury the question whether the verdict is supported by any evidence is not open to review by the Court of Appeals. *Bank of Monongahela Valley v. Weston.* 259

7. *Certified Question Involving Question Not Certified Cannot Be Answered by Court of Appeals.* A question certified to the Court of Appeals by the Appellate Division: "Has the court in a suit upon a common-law cause of action, brought by an administrator, jurisdiction to order a reference of all the issues in the action to a referee to hear and determine the same where the administrator opposes the granting of such order and demands a trial by jury?" cannot be answered correctly either in the negative or affirmative where the questions as to whether a trial of the case will necessarily involve the examination and auditing of a long account, or as to whether independent issues are raised by the pleadings, have not been certified; and an appeal from an order of the Appellate Division reversing an order of the Special Term granting a compulsory reference, upon the ground that an administrator being a party he has the constitutional right to demand a jury trial, must be dismissed. *Malone v. Sts. Peter and Paul's Church.* 269

8. *Nonsuit — Presumption.* On appeal from a judgment dismissing the complaint at the close of the plaintiff's opening address, every material fact in issue will be resolved or found in his favor. *Hoffman House v. Foote.* 348

9. *Order of Appellate Division Cannot Be Reviewed upon Appeal Taken Direct from Decree of Surrogate's Court Made after and in Accordance with Such Order.* An order of the Appellate Division modifying a decree of a

APPEAL—Continued

Surrogate's Court is not reviewable by the Court of Appeals upon an appeal taken directly from a decree of a Surrogate's Court made and entered after, and in accordance with, such order, notwithstanding the notice of appeal gives notice of an intention to bring such order up for review, since the order is not only not an intermediate order of the Appellate Division, but is a final order and can only be brought up by direct appeal therefrom or by appeal from a final judgment or order of the Appellate Division affirming the decree of the Surrogate's Court entered after and in accordance with the order sought to be reviewed. *Matter of Union Trust Co.* 494

10. *When Judgment of Modification by Appellate Division, which Is in Effect a Reversal, Should Grant a New Trial.* The Appellate Division has no power to modify a judgment of the Special Term, which awarded a separate item of damages to one of the plaintiffs, by striking out such award of damages, thus in effect reversing that part of the judgment, without granting a new trial as to such plaintiff, in a case where the facts may be changed upon a new trial, and this court will modify the judgment of the Appellate Division in that respect by granting a new trial only as to the plaintiff affected thereby, where that can be done without interfering with the rights of the other plaintiff. *Van Sicken v. City of New York.* 504

11. *Surrogate's Court—When Conclusions of Law Found in Support of Decree Settling an Intestate's Estate Reviewable in Court of Appeals.* Exceptions to a surrogate's conclusions of law, in dismissing a proceeding in a Surrogate's Court, present questions of law which are reviewable by the Court of Appeals upon an appeal from an order of the Appellate Division affirming the decree of the Surrogate's Court entered upon and in accordance with such conclusions of law. *Matter of Killan.* 547

12. *Court of Appeals Has no Power to Set Aside Verdict against the Weight of Evidence.* Where a judgment entered upon a verdict has some evidence to support it, however unworthy of belief it may seem, the Court of Appeals has no power to reverse the judgment solely upon that ground; that power rests with the Appellate Division of the Supreme Court. *Merchants' Nat. Bank v. Barnes.* 618

Reversible error—erroneous evidence—striking out—burden of showing improper evidence to be harmless rests on prosecution.

See CRIMES, 16, 18, 21, 22.

APPELLATE DIVISION.

When, has no power to review or reverse upon the facts.

See APPEAL, 1.

Disputed facts deemed settled after unanimous affirmance by.

See APPEAL, 2.

When Court of Appeals not precluded from considering evidence by unanimous affirmance by.

See APPEAL, 5.

When unanimous affirmance by, of judgment entered upon verdict is not reviewable by Court of Appeals.

See APPEAL, 6.

Question certified by—when cannot be answered by Court of Appeals.

See APPEAL, 7.

Order of, cannot be reviewed upon appeal taken direct from decree of Surrogates' Court made after and in accordance with such order.

See APPEAL, 9.

APPELLATE DIVISION — *Continued.*

When judgment of modification by, which is in effect a reversal should grant a new trial.

See APPEAL, 10.

Power of, to set aside verdict as against weight of evidence.

See APPEAL, 12.

Statute authorizing appointment by, of commissioner of jurors in New York county constitutional.

See CONSTITUTIONAL LAW, 2.

Duty of, upon review by certiorari of determination of railroad commissioners.

See RAILROADS, 2.

APPRAISAL

For transfer tax upon contingent remainders — method.

See TAX, 4.

ASSESSMENT.

For taxation in New York city — review of.

See TAX, 1, 2.

Illegal — land cannot be reassessed without notice.

See TAX, 5.

ASSOCIATIONS:

1. *Insurance — Unreasonable Amendment of By-laws Depriving Beneficiary of Rights under Policy Issued by Mutual Benefit Society.* A mutual benefit society which has insured a member against unintentional self-destruction after one year, cannot, by a subsequent amendment of its by-laws providing in effect that self-destruction while insane within five years from the date of the policy should render it void, deprive the beneficiary of his rights under the contract, since such amendment is unreasonable. *Weber v. Supreme Tent K. of M.* 490

2. *Building and Loan Associations — When Shareholder May Recover Amount Named in Certificate of Stock.* Where a certificate of stock, issued by a building and loan association to a member thereof, provides that in consideration of a membership fee, the agreements and statements contained in his application for membership and full compliance with the terms, conditions and by-laws printed on the front and back of the certificate, the association would pay him, or his legal representatives, the sum of \$100 for each of the shares held by him at the end of seventy-eight months from the date of the certificate, the amount of the monthly installments to be paid upon each share and the actual date of the maturity of the certificate being fixed by an indorsement upon the back thereof, the holder of the certificate is entitled upon the maturity thereof, the required installments having been paid, to the maturity or par value of each share of stock held by him under such certificate. *Vought v. Eastern B. & L. Assn.* 508

3. *Same — Terms and Conditions of Contract not Inconsistent with Absolute Promise to Pay Amount Named in Certificate.* Provisions in the terms, conditions, by-laws and articles of association printed upon the front and back of the certificate and made a part of the contract which provide that a shareholder should pay seventy-five cents a month on each share until the share matures or is withdrawn; that all shareholders should pay a monthly installment of seventy-five cents a share until the same shall be fully paid; that the amount to be paid to the owner of the shares at maturity shall be \$100 per share; that at stated periods the profits arising from interest, premiums, fines and other sources should be apportioned among the shares in good standing, and that no money should

ASSOCIATIONS — Continued.

be-drawn from the loan fund for any other purpose than the making of loans on security and to pay amounts due withdrawing shareholders. are not so inconsistent with the promise to pay the amount named in the certificate as to show an intention that such payment should be made only in the event that, upon the shares held under such certificate, there has been paid a sum which, together with the profits apportioned thereto, would amount to its face value. *Id.*

4. *Same*—Term "*Withdrawing Shareholders*" Defined. The provision contained among those referred to and made a part of the contract, that no money may be drawn from the loan fund for any other purpose except making loans on security and to pay amounts due withdrawing shareholders, does not preclude the payment of the amount called for by the certificate, since the term "*withdrawing shareholder*" in that connection means not only shareholders who may withdraw before the maturity of their certificates, but also those who shall withdraw at that time or afterwards. *Id.*

5. *Evidence*—When Application for Membership not a Necessary Part of Plaintiff's Proof in Action to Recover upon Certificate. In an action brought by a certificate holder against the association to recover the amount of the certificate, the failure of the plaintiff to introduce in evidence his application for membership in the association will not prevent a recovery, where it was not made a part of the contract, but preceded it, and was only mentioned as part of the consideration therefor, and, when the defendant makes no claim that it constituted a defense, the omission to introduce it cannot be regarded as a defect in proof. *Id.*

6. *Ultra Vires* not Available as Defense when Certificate Holder Has Complied with Contract in Good Faith. A defense in such an action, that the defendant was unauthorized by the statute under which it was organized to make such a contract, assuming that it was *ultra vires*, as to which no opinion is expressed, is not available where the contract has been in good faith fully performed by the plaintiff and the defendant has had the benefit of such performance and of the contract. *Id.*

Joint stock associations—shares are personal property and taxable as such.

See TAX, 6-9.

For lending money—usurious loans made by such subject to penalty of forfeiture.

See USURY.

BANKING.

1. *Evidence*—Presumption of Ownership. Possession by a bank of drafts which it claims to own and forwards to a correspondent for collection gives rise to the presumption that such bank owns the drafts and entitles the bank to be treated in law as the owner in the absence of any distinct proof that it was not the owner of the paper. *Nat. Reserve Bank v. Nat. Bank of Republic.* 102

2. *Collection*. In the absence of proof that paper forwarded by one bank to another was sent and received for some other purpose than its collection, the employment to collect, although not expressed in words, will be presumed from the fact that the bank receiving the paper had a correspondent at the place of payment, while the bank sending the paper did not, where the previous course of business between the two banks tends to confirm the inference. *Id.*

3. *Same*. That one bank transmitted drafts to another in the usual course of business, and that the latter mailed it to a correspondent at the place where it was payable, imports, in the absence of any special agree-

BANKING— *Continued.*

ment, an undertaking to perform the ordinary duty of collecting the paper and accounting for the proceeds, if paid, and if not paid to return the drafts unimpaired as to the liability of all the parties. *Id.*

4. *Agency.* A bank which is the collecting agent of another does not cease to be such because it is the drawee upon which the drafts forwarded to it for collection are drawn. *Id.*

5. *Evidence—Presumption of Solvency.* In an action to recover damages for the failure of a bank to collect drafts or to take steps to charge the indorser thereon, it will be presumed, in the absence of proof to the contrary, that the indorser was solvent. *Id.*

6. *Duty as to Collections.* It is the duty of a bank with which paper is left for collection to send it forward, make proper demand of payment and receive and account for the money or take the proper steps to charge the indorser. *Id.*

7. *Construction of Rules of New York Clearing House Concerning Repayment of Commercial Paper Returned as "Not Good."* The provision of the constitution of the New York Clearing House, that "All checks, drafts, notes or items in the exchanges returned as 'not good,' or mis-sent, shall be returned the same day directly to the bank from which they were received, and the said bank shall immediately refund, to the bank returning the same, the amount which it had received through the clearing house for the said checks, drafts, notes or items, so returned to it, in specie or legal tender notes," is not repealed or abrogated by a later provision, that, in case of the failure or inability of any bank to promptly refund to the bank holding paper returned as "not good," such bank may report to the manager of the clearing house the amount of the same, who shall thereafter, with the approval of the clearing house committee, readjust the clearing house statement and declare the correct balance between such banks, provided that such report be given to the manager before one o'clock of the same day; and the bank charged by the clearing house with the amount of the paper returned as "not good" is at liberty to let such charge stand against it in the account of the clearing house and seek reclamation directly from the bank required to refund such amount under express contract of the latter imposed upon it by the rules of the clearing house. *Mt. Morris Bank v. Twenty-third Ward Bank.* 244

8. *Promissory Note—Erroneous Certification, of which Holder Is Immediately Notified—When Paid Through Clearing House, Amount Thereof May Be Recovered from Bank Receiving It.* Where one bank, at the request of another, certified, through mistake, a note payable at it as good, but within a short time, and on the same day, discovered the error and notified the bank holding the note of such error and requested it to erase the certification, and the latter bank, notwithstanding such notice, sent the note, through its clearing bank and agent, to the clearing house by which it was charged to the account of the clearing bank and agent of the bank at which said note was payable, and on the same day the latter bank tendered a return of the note both to the bank which had sent the note to the clearing house and its clearing bank, and demanded repayment of the amount thereof, which was refused, such bank may maintain an action to recover such amount against the bank receiving the same from the clearing house, since it was not the duty of the plaintiff bank to have applied to the manager of the clearing house for a resettlement of the accounts, and its failure to do so did not operate to make the payment of the note voluntary. *Id.*

Failure to collect paper.

See *APPEAL*, 3.

BANKING — *Continued.*

Bad faith in discounting notes.

See **BILLS, NOTES AND CHECKS**, 2.

Discounting notes — good faith.

See **TRIAL**, 2, 3.

BANKS.

Assessment of national bank stock at higher ratio of value than real estate — when equity will not restrain collection of tax.

See **TAX**, 2.

BENEFIT ASSOCIATIONS.

Unreasonable amendment of by-laws depriving beneficiary of rights under policy.

See **ASSOCIATIONS**, 1.

BILLS, NOTES AND CHECKS.

1. *Partnership — Accommodation Indorsement — Estoppel.* A partner who has knowledge that a copartner is persistently using the firm name for the accommodation of others by indorsing notes in the name of the firm for purposes foreign to the partnership business is estopped from questioning the validity of a note bearing such an indorsement, although made after the dissolution of the partnership, where he took no effectual means to put a stop to the practice and did not publish or communicate the fact of the dissolution to the public or to parties who were giving credit to the firm name. *Bank of Monongahela Valley v. Weston.* 259

2. *Evidence — Bad Faith.* A bank is not chargeable with bad faith because it discounted notes at the rate of seven per cent per annum when the legal rate of interest was but six per cent. *Id.*

Presumption of ownership of draft — collection — presumption of solvency — duty as to collections.

See **BANKING**, 1-6.

Construction of rules of New York Clearing House concerning repayment of commercial paper returned as "not good" — promissory note — erroneous certification, of which holder is immediately notified — when paid through clearing house amount thereof may be recovered from bank receiving it.

See **BANKING**, 7, 8.

Parol evidence inadmissible to show that note, absolutely delivered at date thereof, was not to be paid upon the happening of a subsequent contingency.

See **EVIDENCE**, 1.

Outlawed note, not revived by letter of indorser offering to buy it for a small sum.

See **LIMITATION OF ACTIONS**, 1.

BONDS.

Indemnity.

See **TRUSTS**, 3.

Liability of trustee to bondholders for failure to comply with provisions of mortgage.

See **TRUSTS**, 4, 5.

BROOKLYN (CITY OF).

Revocation of pension to widow of policeman — when mandamus not granted.

See **NEW YORK (CITY OF)**, 1.

BUILDING ASSOCIATIONS.

When shareholder may recover amount named in certificate of stock — terms and conditions of contract not inconsistent with absolute promise to pay amount named in certificate — term "withdrawing shareholders," defined — when application for membership not a necessary part of plaintiff's proof in action to recover upon certificate — *ultra vires* not available as a defense when certificate holder has complied with contract in good faith.

See ASSOCIATIONS, 2-6.

BY-LAWS.

Of mutual benefit society — unreasonable amendment.

See ASSOCIATIONS, 1.

CAUSE OF ACTION.

Leasing premises with knowledge of existing nuisance — tenant's right of action for damages.

See LANDLORD AND TENANT, 1.

When allegations of complaint do not state facts constituting.

See PLEADING.

CERTIFICATION.

Erroneous, of promissory note — when note, paid through clearing house, amount thereof may be recovered from bank receiving it.

See BANKING, 8.

CERTIFIED QUESTION.

When cannot be answered by Court of Appeals.

See APPEAL, 7.

CERTIORARI.

Public Improvements Commission. The proceedings of a public improvement commission in awarding a contract for curbing and paving are neither judicial nor quasi judicial, and hence not subject to review by certiorari before the assessment of a tax. *People ex rel. North v. Featherstonhaugh.* 112

Directors' abuse of discretion in operating railroad may be remedied by Board of Railroad Commissioners, whose determination is reviewable by.

See RAILROADS, 2.

Review by, of assessments for taxation in New York city.

See TAX, 1, 2.

CHARGE.

Erroneous refusal to charge.

See TRIAL, 10.

CHARITABLE INSTITUTIONS.

1. *Payments of Public Moneys to Institutions Wholly or Partly under Private Control — Rules of the State Board of Charities.* A municipal corporation is prohibited by the Constitution (Art. 8, § 14) and the statutes (L. 1895, ch. 754; L. 1896, ch. 546, § 9, subd. 8), from paying public moneys to a charitable institution wholly or partly under private control, for the care, support and maintenance of inmates who are not received and retained therein pursuant to the rules established by the state board of charities for the purpose of determining whether such inmates are properly a public charge. *Matter of N. Y. Juvenile Asylum.* 50

2. *New York Juvenile Asylum — Charter Provision Requiring Payment by the City and County of New York for the Support of Inmates not Committed to It in Accordance with Rules of State Board of Charities, Super-*

CHARITABLE INSTITUTIONS — *Continued.*

ceded by the Constitution. The fact that the New York Juvenile Asylum, a private charitable institution, was authorized by its charter (L. 1851, ch. 332) to take under its care the management of such children as should by the consent, in writing, of their parents or guardians, be voluntarily surrendered and intrusted to it, and by section 28 of chapter 245 of the Laws of 1886 might require the county of New York to pay annually a specified sum for the support of children so committed to it, which section was incorporated into the charter of Greater New York (L. 1897, ch. 378, § 230) and has not in terms been repealed, amended or modified, does not authorize the city and county of New York to pay for the support and maintenance of any inmate not received and retained therein pursuant to the rules of the state board of charities, since such payment is prohibited, not by the rules effecting the repeal or amendment of the statute conferring the right thereto, but by the Constitution itself, which superseded the statute and operated presently from the time the rules were established. *Id.*

CITIES.

Street paving — public improvement commission.

See APPEAL, 4.

Proceedings of public improvement commission in awarding contract, when not reviewable by certiorari.

See CERTIORARI, 1.

Proceedings to lay out street across railroad tracks.

See MUNICIPAL CORPORATIONS, 5.

CIVIL SERVICE.

Removal of fireman appointed under charter of Long Island City, by fire commissioner of New York city.

See NEW YORK (CITY OF), 2.

Power of board of aldermen to elect its own officers and appointees.

See NEW YORK (CITY OF), 3.

CLEARING HOUSE.

Construction of rules of, concerning repayment of commercial paper returned as not good.

See BANKING, 7.

CODE OF CIVIL PROCEDURE.

1. § 888 — *Action against Trustee for Breach of Implied Legal Duties or Obligations, Must Be Commenced within Ten Years from Time of Breach of Trust.* The failure of a trustee to carry out the provisions of a mortgage and protect the interests of the bondholders by refusing to issue bonds and pay out the proceeds thereof until assets available to support the mortgage security should be acquired by the railroad company, unless ordered to do so by the court, constitutes a breach of an implied legal duty or obligation springing from the relation of trustee and *cestui que trust*, upon which an action against the trustee can be maintained by aggrieved bondholders, but such action falls within the provisions of section 888 of the Code of Civil Procedure and must be commenced within ten years from the time of the last delivery of the bonds by the trustee to the railroad company. *Rhineland v. Farmers' Loan & Trust Co.* 519

2. § 401 — *Operation of Statute of Limitations Suspended by Non-residence of Debtor Notwithstanding Casual Visits to the State.* Where a person removed from the State of New York to another state after a cause of action had accrued against him and has since resided in the latter state such absence suspends the running of the Statute of Limitations against him, notwithstanding the fact that he has made a number of brief visits

CODE OF CIVIL PROCEDURE — Continued.

to the city of New York or to his old residence within this state; the amendment of 1888, changing section 401 of the Code of Civil Procedure so that it reads, "departs from and resides without the State and remains continuously absent therefrom," instead of "or remains continuously absent therefrom," did not alter the rule that non-residence is absence, and that casual visits to the state do not destroy the continuity of the absence. *Connecticut Trust & S. D. Co. v. Wead.* 497

3. §§ 452, 499 — *Insurance — Action to Reform Life Insurance Policy and for Judgment Thereon — Parties Defendant.* Where a life insurance policy was erroneously, or fraudulently, made payable to the insured, or his legal representatives, instead of to a creditor thereof, for whose benefit the policy was obtained and by whom the premiums were paid, the legal representatives of the insured are necessary parties to an action brought by the creditor, after the death of the insured, against the company to have the policy reformed and made payable to such creditor instead of to the legal representatives of the insured and for judgment upon the policy so reformed for the money due thereunder, and although no attempt was made by defendant to raise the objection, by demurrer or answer, that there was a defect of parties defendant, a motion, made at the close of the evidence upon the trial, to dismiss the complaint for such defect of parties, should have been granted unless within a reasonable time the personal representatives of the insured were brought in, not necessarily for the protection of the defendant, for it had neglected its rights, but for the protection of the representatives of the insured as well as the seemly and orderly administration of justice, that there might be a complete determination of the controversy; since section 499 of the Code of Civil Procedure, providing that where "Such an objection is not taken, either by demurrer or answer, the defendant is deemed to have waived it," must be read in connection with section 452, which provides that "Where a complete determination of the controversy cannot be had without the presence of other parties, the court must direct them to be brought in." *Steinbach v. Prudential Ins. Co.* 471

4. § 880 — *Crimes — Reading on Second Trial of Testimony of Deceased Witness Taken on First Trial.* While there is no express provision of the Code of Criminal Procedure authorizing the reading on a second trial of the testimony of a deceased witness sworn at the first trial of a criminal action, section 880 of the Code of Civil Procedure, authorizing the reading of such testimony taken at the former trial of an action, is also applicable to a criminal action, since the word "action," as defined in section 3333 of the Code of Civil Procedure, refers to both civil and criminal actions. *People v. Elliott.* 146

5. §§ 1628, 1630 — *Mortgage — Action to Foreclose, After Foreclosure of Another Mortgage on Other Property Given in Part as Collateral Security for Debt Secured by First Mortgage.* An action to foreclose two mortgages upon the same property, made by the same mortgagor and held by the same assignee, is not prohibited by sections 1628 and 1630 of the Code of Civil Procedure, notwithstanding that another mortgage given by the same mortgagor upon another property to the same mortgagee to secure the payment of another debt and also as a further and additional security for the debts represented by the first two mortgages, had been foreclosed by such mortgagee and the proceeds of the sale, after paying the expenses of foreclosing the last mortgage, and the amount for which it was given, had been applied upon the payment of the debts secured by the first two mortgages but leaving a deficiency for which no judgment was ever entered or docketed, or execution issued to collect the amount thereof, and that after such sale the mortgagee assigned the first two mortgages without in terms transferring any right to the deficiency, which, however, passed by operation of law to an assignee who thereafter, and without obtaining leave of the court, began the action to foreclose the

CODE OF CIVIL PROCEDURE — Continued.

first two mortgages: since the deficiency judgment, if one had been entered and docketed, would not have been a "final judgment for the plaintiff * * * in an action to recover any part of the mortgage debt" secured by the first two mortgages and no action has been brought to recover any part of such mortgage debt, within the meaning of the statute, for the reason that the suit to foreclose the mortgagor's equity of redemption in the property covered by the last mortgage was not such an action. *Reichert v. Stilwell.* 83

6. §§ 2514, 2518-2523 — *Judicial Settlement of Administrator's Accounts Void as Against Interested Parties Not Cited or Appearing Thereon.* A judicial settlement of the accounts of an administrator of an estate is void as against persons interested in the estate, within the meaning of the statute (Code Civ. Pro. § 2514, subd. 11), whether known or unknown, who were not duly cited to appear, or did not appear voluntarily at such judicial settlement; since the Code of Civil Procedure (§§ 2518-2523) provides ample protection to such administrator by permitting him to sue out a citation running against persons unknown. *Matter of Killan.* 547

7. §§ 2726, 2727 — *Unknown Brother of an Intestate Not Cited or Appearing at Judicial Settlement of Estate, May Institute Proceedings for New Accounting upon Notice to Parties Interested and Proof of his Relationship.* A person residing in a foreign country and claiming to be the brother and only next of kin of an intestate, in whose estate there has been a judicial settlement of the accounts of the administrator, to which claimant was not cited and was not a party, is entitled to institute a proceeding in the Surrogate's Court against the administrator for a new accounting under the provisions of the statute (Code Civ. Pro. § 2726, subd. 1, and § 2727), and to an order that a commission issue, with interrogatories, for the examination of the petitioner and his witnesses; and it is reversible error to dismiss such proceeding and deny the application for a commission and remit the petitioner to a motion to open the decree in such judicial settlement, addressed to the discretion of the Surrogate's Court; the proper practice is not to dismiss the proceeding, but to require the petitioner to amend his citation and bring in the parties who were cited or appeared on the original accounting, that all of such parties may join in the application for a commission and be represented at the execution thereof; the petitioner, if he succeeds in establishing that he is a brother of the intestate, may then have an accounting under the provisions of the Code invoked by him. *Id.*

8. § 2732 — *Surrogate's Court — Distribution of Personal Property of Intestate Leaving Nephew and Niece and Uncles and Aunts and Descendants of Deceased Uncles and Aunts.* Subdivision 12 of section 2732 of the Code of Civil Procedure, as amended by chapter 319 of the Laws of 1898, providing that in the distribution of personal property of decedents, "Representation shall be admitted among collaterals in the same manner as allowed by law in reference to real estate," must be construed with subdivision 5 of such section, providing that "If there be no widow, and no children, and no representatives of a child, the whole surplus shall be distributed to the next of kin, in equal degree to the deceased, and their legal representatives," and with subdivision 10 of such section, which provides that "When the descendants, or next of kin of the deceased, entitled to share in his estate, are all in equal degree to the deceased, their shares shall be equal;" and where an intestate, leaving personal property only, is survived by a nephew and niece, the children of a deceased brother, two uncles, two aunts and many descendants of deceased uncles and aunts, the nephew and niece, the two uncles and the two aunts are all of the same degree of kinship, to wit, the third, and it is unnecessary to invoke the rule of representation, and the estate should be distributed equally among them. *Matter of Davenport.* 454

§ 3333. See par. 4, this title.

CODE OF CRIMINAL PROCEDURE.

1. § 8 — *When Right of Confrontment Is Not Violated.* The right of the accused to be confronted with the witnesses against him in the presence of the court, provided for in subdivision 3 of section 8 of the Code of Criminal Procedure, which is merely a re-enactment of section 14 of the Bill of Rights, is not violated by the reading of such testimony on the second trial, where only such testimony is read as was taken on the first trial in the presence of the accused, represented by counsel exercising the full right of cross-examination, and, therefore, the accused has been once confronted by the witness against him in the presence of the court. *People v. Elliott.* 146

2. § 334 — *Murder — Trial — Former Jeopardy — Question of Fact.* A plea of former jeopardy which fails to allege either a former conviction or a former acquittal as required by subdivision 4 of section 334 of the Code of Criminal Procedure, is insufficient and presents no issue of fact for the determination of a jury. *People v. Smith.* 210

3. § 416 — *Discharge of Jury.* The discharge of the jury and the postponement of the trial in a criminal action because of the illness of one of the jurors incapacitating him from performing his duties are authorized by section 416 of the Code of Criminal Procedure, providing for the discharge of a sick juror and the impaneling of another jury then or afterward, and a plea of former jeopardy cannot be based upon such discharge and postponement. *Id.*

COLLECTION.

Of commercial paper — duty of bank as to.

See BANKING, 1-6.

COMITY.

Extradition does not depend on.

See EXTRADITION, 1.

COMPLAINT.

When allegations of, do not state facts sufficient to constitute a cause of action.

See PLEADING.

CONSIDERATION.

Condition precedent.

See CONTRACT.

CONSTITUTIONAL LAW.

1. *Villages — The Statute (L. 1898, Ch. 269, Art. 2, § 5) Requiring that a Voter upon a Proposition to Establish Water Works in the Village of Fulton and Issue Bonds Therefor, or His Wife, Must be a Taxpayer, Is Not Unconstitutional.* The provision of the statute (L. 1898, ch. 269, art. 2, § 5) defining the qualifications of voters in the village of Fulton and requiring that a voter, in order to vote upon a proposition that the village establish a system of water works and issue bonds for that purpose, "must be entitled to vote for an officer, and he or his wife must also be the owner of property in the village, assessed upon the last preceding assessment roll thereof," is not in conflict with section 1 of article 2 of the Constitution of the state, defining the qualifications of electors of the state and providing that such electors shall be entitled to vote "for all officers that now are or hereafter may be elective by the people; and upon all questions which may be submitted to the vote of the people;" since such provision must be construed in connection with section 1 of article 12 of the Constitution, which provides that "It shall be the duty of the Legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in

CONSTITUTIONAL LAW — Continued.

assessments and in contracting debt by such municipal corporations," and so construed, the first provision is general and relates only to the general governmental affairs of the state; the latter is local and relates to the business or private affairs of the municipalities specified, and the statute is in accordance with the established policy of the state to limit the right of suffrage as to the business or financial affairs of its various villages to the taxpayers of the municipality, and is fully justified by, and not in conflict with, the provisions of the organic law. *Spitzer v. Village of Fulton.* 285

2. *New York (County of), Commissioner of Jurors in — Chapter 602 of Laws of 1901, Authorizing Appointment of, by Appellate Division, not Violative of Section 2 of Article 10 of Constitution.* Chapter 602 of the Laws of 1901, providing "for the appointment of a commissioner of jurors in each county of the state having a population of one million or more, according to the last preceding census, who shall be appointed by the justices of the Appellate Division of the Supreme Court in the department in which such county is situated, or a majority of them," which conflicts with and repeals prior statutes creating and providing for a commissioner of jurors in the city of New York, does not violate section 2 of article 10 of the Constitution, providing that "All city, town and village officers, whose election or appointment is not provided for by this Constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the Legislature shall designate for that purpose. All other officers, whose election or appointment is not provided for by this Constitution, and all officers, whose offices may hereafter be created by law, shall be elected by the people, or appointed, as the Legislature may direct." The act is a valid exercise of legislative power, because it abolishes the office of commissioner of jurors of the city of New York, which office, not having been provided for by the Constitution, the legislature had the power to abolish, and, so far as the county of New York is concerned, creates a new office after the adoption of the Constitution, viz., a commissioner of jurors of the county of New York, whose functions are to be exercised therein, not in the city, and whose expenses and compensation are made a county charge; the office, therefore, may be filled by election or by appointment in such manner "as the legislature may direct." Such legislation is justified by reason of the enlargement of the city so as to embrace other counties than the county of New York, and it is for the legislature to distribute the powers of local government, as between the city and the county governments, as it may deem best, and this discretion, when not restrained or excluded by some provision of the Constitution, is absolute. *Matter of Allison v. Welde.* 421

Payments of public moneys to institutions wholly or partly under private control — provision of charter of New York Juvenile Asylum requiring payment by the city and county of New York for the support of inmates not committed to it in accordance with rules of state board of charities superseded by the Constitution.

See CHARITABLE INSTITUTIONS, 1, 2.

Comity — extradition does not depend on.

See EXTRADITION, 1.

When court may order compulsory reference in common-law action brought by executor or administrator.

See PRACTICE, 1.

CONTRACT.

Consideration — Condition Precedent. A provision in an agreement made by a creditor with a debtor, who had deposited with him corporate bonds as collateral security, to purchase shares of corporate stock held

CONTRACT — Continued.

by a third person or a portion thereof and to sell one half of the whole or of such portion to the debtor, is not the sole consideration of an entire agreement so that failure to purchase all of such third person's stock will render the agreement unenforceable, where it contains independent covenants on the part of the creditor whereby he surrenders his absolute right to dispose of his stock and agrees to sell it to the debtor on credit or to dispose of it on joint account at the latter's option; nor is it a condition precedent to the creditor's right to hold the bonds in his possession for the purposes mentioned in the agreement. *Stokes v. Foote*. 327

Of building and loan association — terms and conditions of, not inconsistent with absolute promise to pay amount named in certificate — *ultra vires* not available as defense when certificate holder has complied with contract in good faith.

See ASSOCIATIONS, 3, 6.

Proceedings of public improvement commission in awarding, when not reviewable by certiorari.

See CERTIORARI.

When parol proof inadmissible, in an action for rescission, to explain or contradict written contract.

See EVIDENCE, 3.

For public improvement — specifications — guaranty of payment — Labor Law — paving.

See MUNICIPAL CORPORATIONS, 1-4.

Of employment of imperfectly registered physician legalized by certificate curing defect.

See PHYSICIANS AND SURGEONS.

Construction of, a question of law.

See TRIAL, 7.

CORPORATIONS.

1. *Stock Dividends Declared Out of Profits Represent Income, not Capital.* Where a corporation has declared a dividend upon its capital stock payable in new stock certificates, if it is based upon an accumulation of earnings or profits, by their distribution in that manner the stockholders receive the representative of income and not of capital. *Lowry v. Farmers' Loan & Trust Co.* 137

2. *When Interest not Allowed after Receivership of Insolvent Corporation.* In the settlement of the affairs of insolvent corporations, while interest is allowed as against the corporation itself or its stockholders if the assets are sufficient for the purpose, as between preferred and unpreferred creditors no interest is allowed after the law takes charge through the appointment of a receiver. *People v. American L. & T. Co.* 371

3. *When Preferences Take Effect and Interest Ceases.* Under the provisions of the charter of an insolvent trust company (L. 1872, ch. 868; L. 1884, ch. 260, § 3), that "in case of the dissolution of the said company by the legislature, the Supreme Court, or otherwise, the debts due from the company as trustee, guardian, receiver or depository of money in court or of savings banks funds shall have a preference," as well as under a similar provision of the General Banking Law (L. 1892, ch. 689, § 130), preferences take effect upon the appointment of a receiver, but preferred creditors are not entitled, upon the settlement of the receiver's accounts and the distribution of the funds in his hands, to any interest, contractual or as damages, upon their claims, from the date of the appointment of the receiver; interest is payable to all creditors if the assets are

CORPORATIONS — Continued.

sufficient; if not, interest ceases upon their claim, whether preferred or unpreferred, from the date of such appointment. *Id.*

Action to enforce judgment, recovered against a corporation, against its president personally.

See PLEADING.

Railroad corporation cannot in first instance be compelled by mandamus to operate trains in a designated manner — directors' abuse of discretion in operating road may be remedied by Board of Railroad Commissioners, whose determination may be enforced by mandamus and is reviewable by certiorari.

See RAILROADS, 1, 2.

Railroad — when right to select new terminus and extend existing road into an adjoining county is limited.

See RAILROADS, 3.

When may maintain suit as trustee to reclaim property pledged.

See TRUSTS, 2.

For lending money on personal property — usurious loans, made by such, subject to penalty of forfeiture.

See USURY.

COURT OF APPEALS.

When must reverse order of Appellate Division reversing judgment upon facts.

See APPEAL, 1.

When will deem disputed facts settled.

See APPEAL, 2.

When objection cannot be urged for first time in.

See APPEAL, 3.

When no question of law raised for review by.

See APPEAL, 4.

When not precluded from considering evidence by unanimous affirmance in Appellate Division.

See APPEAL, 5.

When unanimous affirmance by Appellate Division of judgment entered upon verdict is not reviewable by.

See APPEAL, 6.

When question certified by Appellate Division cannot be answered by.

See APPEAL, 7.

Order of Appellate Division cannot be reviewed by, upon appeal taken direct from decree of Surrogate's Court made after and in accordance with such order.

See APPEAL, 9.

When conclusions of law found in support of decree settling an intestate's estate are reviewable in Court of Appeals.

See APPEAL, 11.

Has no power to set aside verdict as against the weight of evidence.

See APPEAL, 12.

COURTS.

Judicial knowledge.

See EXTRADITION, 9.

When have power to order compulsory reference in common-law action brought by executor or administrator.

See PRACTICE.

COVENANTS.

Restriction as to use of premises for a saloon, when removed by quit-claim deed.

See DEED.

CRIMES.

1. *Section 880 of the Code of Civil Procedure, Relating to the Reading on Second Trial of Testimony of Deceased Witness Taken on First Trial, Applicable to Criminal Trials.* While there is no express provision of the Code of Criminal Procedure authorizing the reading on a second trial of the testimony of a deceased witness sworn at the first trial of a criminal action, section 880 of the Code of Civil Procedure, authorizing the reading of such testimony taken at the former trial of an action, is also applicable to a criminal action, since the word "action," as defined in section 3333 of the Code of Civil Procedure, refers to both civil and criminal actions. *People v. Elliott.* 146

2. *When Right of Confrontment Provided for in Subdivision 3, Section 8, Code of Criminal Procedure, Is Not Violated.* The right of the accused to be confronted with the witnesses against him in the presence of the court, provided for in subdivision 3 of section 8 of the Code of Criminal Procedure, which is merely a re-enactment of section 14 of the Bill of Rights, is not violated by the reading of such testimony on the second trial, where only such testimony is read as was taken on the first trial, in the presence of the accused, represented by counsel exercising the full right of cross-examination, and, therefore, the accused has been once confronted by the witness against him in the presence of the court. *Id.*

3. *Perjury.* The rule that prevails in cases of perjury, where one oath is placed against another, that there must be two witnesses to prove the charge, or in case only one witness is produced there must be independent corroborating circumstances, has no application where the proof of the crime is necessarily based upon circumstantial evidence. *People v. Doody.* 165

4. *Witness — When Denial of Recollection as to Material Facts Constitutes Perjury.* A witness who swears falsely, willfully and corruptly to the effect that he does not remember certain material facts involved in the issue on trial, when it is shown by competent proof that he did remember them, is properly convicted of the crime of perjury. *Id.*

5. *When Evidence Tending to Establish the Falsity of His Denial Is not Incompetent as Tending to Prove Other Offenses — Admissibility of Evidence as to the Probability of the Truth of his Denial.* The previous statements and admissions of one on trial for perjury in falsely swearing that he did not remember material facts involved in an issue on trial, by which he accused himself and others of conspiracy and the commission of a crime, are not inadmissible as tending to prove the commission by him of another offense when the sole purpose of such testimony is to establish the fact that he did remember them; nor are indictments against his confederates based upon such statements inadmissible since they are competent as to the probability of the witness' forgetting events which produced such startling results. *Id.*

6. *When Defense of Irresponsibility for Denial of Recollection Is a Question of Fact.* The truth or falsehood of a defense, that the defend-

CRIMES—Continued.

ant, at the time he testified he did not remember, was and had been suffering from paresis which paralyzed his memory to such an extent that he could not be held responsible for his answers, is a question of fact for the jury and its determination against him if made upon sufficient evidence will not be disturbed upon appeal. *Id.*

7. *Latitude Allowed the District Attorney in Discussing a Criminal Case.* Upon a criminal trial the district attorney is entitled to discuss before the jury all the facts and circumstances bearing upon the issue and within the scope of the evidence with the same freedom of speech that is to be awarded to counsel in any case. *Id.*

8. *Murder—Trial—Former Jeopardy—Question of Fact.* A plea of former jeopardy which fails to allege either a former conviction or a former acquittal as required by subdivision 4 of section 394 of the Code of Criminal Procedure, is insufficient and presents no issue of fact for the determination of a jury. *People v. Smith.* 210

9. *Discharge of Jury.* The discharge of the jury and the postponement of the trial in a criminal action because of the illness of one of the jurors incapacitating him from performing his duties are authorized by section 416 of the Code of Criminal Procedure, providing for the discharge of a sick juror and the impaneling of another jury then or afterward, and a plea of former jeopardy cannot be based upon such discharge and postponement. *Id.*

10. *New Trial—Arrest of Judgment.* Motions for a new trial and in arrest of judgment made in a criminal action and based on a plea of former jeopardy are properly denied where there was neither a former conviction nor acquittal on the merits, but the former trial was terminated before verdict, by order of the court, because of the illness of a juror. *Id.*

11. *Evidence—Finding of Weapon—Competency.* Evidence, in a trial for homicide, of finding upon the premises of the accused the frame of a revolver with which it was claimed the murder was committed and which was partially covered with black grease and emitted a smell of burnt powder from the barrel, together with testimony of the finding of the center pin and of several cartridges containing bullets similar to the one extracted from the head of the deceased, is competent, although the cylinder was not found and no direct proof made that there was a cylinder in the frame while it was in the possession of the accused. *Id.*

12. *Opinion of Lay Witness.* In a murder trial, upon the cross-examination of a witness for the prosecution who has testified to acts and conversations of the accused subsequent to the homicide, the court may properly exclude evidence as to whether the conduct of the accused seemed to the witness to be natural and genuine, when the opinion called for is not restricted to any particular act or acts testified to by him, and the witness is not shown to possess any superior knowledge on which to base an opinion. *Id.*

13. *Testimony upon Which to Form a Basis for Conjecture Inadmissible.* On the trial of one charged with the shooting of his wife resulting in her death, testimony of a nurse as to the appearance, silence and demeanor of the wife when the accused came into the room where she was, as well as a statement concerning her subsequent physical condition and temperature, are inadmissible as a basis from which to draw conjectures as to the wife's belief in the guilt of the husband, whose innocence she had declared, where at the time the accused neither made any direct admission nor performed any act which could be regarded as an admission. *Id.*

14. *When Silence of Accused Does Not Establish Acquiescence.* That a husband under arrest on the charge of shooting his wife, whom he was permitted to see before her death, remained silent in her presence and

CRIMES — *Continued.*

did not ask her why she withdrew her hand, turned her head and refused to speak to or look at him, is not such an acquiescence in her conduct as to render testimony of her demeanor admissible, where she had persistently declared him to be innocent, was at the time in a semi-conscious and partially paralyzed condition, and he had been cautioned by her attendants to maintain silence and not disturb her. *Id.*

15. *When Knowledge as to Impulses of Deceased Inadmissible.* It is error to permit a nurse who attended one fatally shot to state her knowledge of the impulses of the deceased when the latter withdrew her hand from that of the accused, her husband, who was permitted to see her, where such knowledge was based upon the looks of the deceased and what she subsequently said, with no proof as to what that statement was. *Id.*

16. *Appeal — Reversible Error.* The erroneous admission in a trial for homicide of evidence as to the silence of the accused while in the presence of the deceased before her death, and as to the demeanor of the latter, constitutes reversible error where the testimony was specially called to the attention of the jury in the charge of the court, and they were told that it might be considered by them in determining the defendant's guilt or innocence. *Id.*

17. *Admission.* Statements made by a husband, accused of killing his wife, to a witness, that although the latter had told him that his wife could not speak before her death, yet the witness was reported in a newspaper as having said that the deceased told her that the husband was guilty, do not constitute an admission by the accused of any fact material to the issue and are inadmissible. *Id.*

18. *Appeal — Erroneous Evidence — Striking Out.* The erroneous admission of expert testimony is not cured by striking out all of it except such portions as bear upon specified subjects, where it is difficult if not impossible for the jury to determine what was stricken out and what remained; nor is the error cured by an offer of the court to strike out the entire evidence of the witness and permit him to be recalled when the proper foundation is laid. *Id.*

19. *Dying Declarations — Admissibility.* Dying declarations are shown to have been made under such a sense of impending death as will justify their admission in evidence where the fact is established by the declarations of the decedent, the testimony of the attending physicians and the circumstances showing the condition of the deceased and that it was realized by her. *Id.*

20. *Previous Occurrence.* Statements made by decedent as to an occurrence which transpired several hours before the homicide and which was an independent transaction not shown to have had any connection with the crime, are not admissible as dying declarations. *Id.*

21. *Appeal — Reversible Error.* The rejection of competent and material evidence or the reception of incompetent and improper evidence which is harmful to a defendant and excepted to presents error requiring reversal. *Id.*

22. *Burden of Showing Improper Evidence Harmless Rests on Prosecution.* The burden of showing on appeal in a criminal action that illegal and improper evidence received was harmful does not rest upon the accused, but the People must show that such evidence was harmless and could not have prejudiced him. *Id.*

Fugitive from justice — presence in demanding state — asylum for criminals — habeas corpus — review of warrant — alibi — evidence — warrant — judicial knowledge — presumption of offender's presence in demanding state.

See EXTRADITION, 2-4, 6-9, 11.

DAMAGES.

Measure of, in action after default in payment of installments of rent.

See LANDLORD AND TENANT, 2.

DEBTOR AND CREDITOR.

Agreement between — consideration — condition precedent.

See CONTRACT.

Outlawed claim not revived by letter of debtor offering to buy it for a small sum — operation of Statute of Limitations suspended by non-residence of debtor, notwithstanding casual visits to the state.

See LIMITATION OF ACTIONS, 1, 2.

DECEDENT'S ESTATE.

Surrogate's Court — Distribution of Personal Property of Intestate Leaving Nephews and Nieces and Uncles and Aunts and Descendants of Deceased Uncles and Aunts — Code Civil Procedure, § 2732, Subdivision 12, as Amended by Chapter 319 of Laws of 1898 — Effect of, when Construed with Subdivisions 5 and 10 of Such Section. Subdivision 12 of section 2732 of the Code of Civil Procedure, as amended by chapter 319 of the Laws of 1898, providing that in the distribution of personal property of decedents, "Representation shall be admitted among collaterals in the same manner as allowed by law in reference to real estate," must be construed with subdivision 5 of such section, providing that "If there be no widow, and no children, and no representatives of a child, the whole surplus shall be distributed to the next of kin, in equal degree to the deceased, and their legal representatives," and with subdivision 10 of such section, which provides that "When the descendants, or next of kin of the deceased, entitled to share in his estate, are all in equal degree to the deceased, their shares shall be equal;" and where an intestate, leaving personal property only, is survived by a nephew and niece, the children of a deceased brother, two uncles, two aunts and many descendants of deceased uncles and aunts, the nephew and niece, the two uncles and the two aunts are all of the same degree of kinship to wit, the third, and it is unnecessary to invoke the rule of representation, and the estate should be distributed equally among them. *Matter of Davenport.* 454

Judicial settlement of administrator's accounts void as against interested parties not cited or appearing thereon.

See SURROGATE'S COURT, 1, 2.

DEED.

Evidence — Restriction as to Use of Premises for a Saloon When Removed by Quitclaim Deed — Acts and Conversations of Parties Inadmissible to Contradict Deed. Where the owner of a building by an instrument in writing conveyed three inches of land with the right to use his party wall to an adjoining owner in consideration of a covenant by the latter, stipulated to run with the land, that she would not during a specified time use a building to be erected by her for a saloon, and a dispute having arisen as to the title to a portion of her lot, the grantor, for a consideration, subsequently executed and delivered to her a quitclaim deed of her entire lot, including that portion in dispute, with no reservation or exception whatever as to the restriction, the effect of the deed is to annul it, and evidence of the acts and conversations of the parties prior to the delivery of the quitclaim deed, in order to show that it was not intended thereby to release or affect the restriction, is inadmissible. *Uihlein v. Matthews.* 154

DEFENSE.

Cannot be urged for first time on appeal.

See APPEAL, 3.

Ultra vires not available by building and loan association as defense against certificate holder who has complied with contract in good faith.

See ASSOCIATIONS, 6.

DEFINITIONS.

Term "withdrawing shareholders" defined.

See ASSOCIATIONS, 4.

DIRECTORS.

Of railroad corporation—abuse of discretion by, in operating road, may be remedied by board of railroad commissioners, whose determination may be enforced by mandamus and is reviewable by certiorari.

See RAILROADS, 1, 2.

DISCOUNT.

Of notes—bad faith.

See BILLS, NOTES AND CHECKS, 2.

Of notes by bank—good faith.

See TRIAL, 2, 3.

DISTRIBUTION.

Of personal property of intestate.

See DECEDENT'S ESTATE.

DISTRICT ATTORNEY.

Latitude allowed, in discussing a criminal case.

See CRIMES, 7.

DIVIDENDS.

Declared out of profits, represent income, not capital.

See CORPORATIONS, 1.

When life beneficiary is entitled to stock dividends as income.

See TRUSTS, 1.

DOWER.

Widow Not Put to an Election between an Annuity Charged upon Real Estate and her Dower. Where a testator devised his real estate to his children, charging upon the portion devised to each, with one exception, an annuity which he required the devisee to pay to his widow annually during her life, no other provision being made for the widow, and the will does not in terms state that the annuities provided for were to be in lieu of dower, the widow will not be put to an election between the annuities and her dower, but is entitled to both, and may maintain an action for the admeasurement of her dower. *Horstmann v. Flege.* 381

When claim of, is incompatible with testamentary provisions for the widow.

See WILL.

DRAFTS.

Presumption of ownership—collection.

See BANKING, 1-6.

ELECTION.

When widow not put to an election between an annuity charged upon real estate and her dower.

See DOWER.

ELECTORS.

Qualifications of voters in village of Fulton.

See CONSTITUTIONAL LAW, 1.

EQUITY.

Power of, to restrain collection of tax where no remedy exists at law — when will not restrain collection of tax.

See TAX, 1, 2.

ESTATES.

Judicial settlement of administrator's accounts void as against interested parties not cited or appearing thereon.

See SURREGATE'S COURT, 1, 2.

Contingent — transfer tax upon, payable forthwith out of property transferred — method of imposing tax.

See TAX, 3, 4.

Transfer tax on succession of life tenant — legislation required to make imposition of tax fairer to life tenant.

See TAX, 10.

When life beneficiary is entitled to stock dividends as income.

See TRUSTS, 1.

ESTOPPEL.

Partnership — accommodation indorsement of note.

See BILLS, NOTES AND CHECKS, 1.

EVIDENCE.

1. *Parol Evidence Inadmissible to Show that Note, Absolutely Delivered at Date Thereof, Was Not to Be Paid upon the Happening of a Subsequent Contingency.* A promissory note for a fixed sum, payable at a certain time and place, and actually delivered to the payee at the date thereof, although accompanied by a contract in writing showing that the note was given for a scholarship in a business college, the course of study to be entered upon by the maker of the note at or about the time the note became due, such scholarship to be transferable after payment therefor has been made and acknowledged, cannot be contradicted by parol evidence that the note was to be binding upon the maker unless she should decide not to take instructions at the school and could not sell her scholarship, in which event the note was to be canceled and the maker released from the payment thereof, since the delivery of the note was not a conditional delivery, not to become complete and effective until the happening of some condition precedent, but was an absolute delivery, which cannot be defeated by the happening of any subsequent contingency. *Jamestown Business College Assn. v. Allen.* 291

2. *Handwriting — Testimony of an Expert as to Identity of Person Making Marks Canceling Signature to a Will, Inadmissible — Marks not "Writings" Within Meaning of Statutes Permitting Comparison of Handwriting by Experts.* When the only question of fact presented for the determination of the court upon the probate of a will is whether the testator's signature thereto was canceled by him, with the intention of revoking his will, by fourteen nearly perpendicular marks drawn across the letters of his signature, the testimony of an expert in inks and handwriting, that, judging from the signatures of the testator appearing on the will, such marks were not made by the same person who wrote the signature to the will, is inadmissible, since such marks are not "writings" within the meaning of the statutes (L. 1880, ch. 36, amd. L. 1888, ch. 555) which permit the comparison of writings by experts, and mere marks or scratches, used either perpendicularly or horizontally over a signature for the purpose of canceling it, do not contain the characteristics necessary in the formation of letters to enable an expert, or any person, to speak with any degree of certainty with reference to the identity of the person who made the marks. *Matter of Hopkins.* 360

EVIDENCE — Continued.

3. *When Parol Proof Inadmissible, in an Action for Rescission, to Explain or Contradict Written Contract.* A written contract to sell all of one's stock in a corporation for a specified sum, containing an agreement that the stock holdings to be turned over amounted to three-fifths of the capital, is not fully performed by the vendor's delivery of a less number of shares, although they constituted his entire holdings, in such a manner as to entitle him upon the vendee's default in payment to maintain an action to rescind the contract, and parol evidence tending to show that the plaintiff intended to sell and the defendant to buy only such stock as was held by the former, irrespective of the amount, is inadmissible, and will not justify a finding of complete performance. *Dady v. O'Rourke.* 447

Sufficient to support verdict.

See APPEAL, 5, 6.

When application for membership not a necessary part of plaintiff's proof in action to recover upon certificate of building and loan association.

See ASSOCIATIONS, 5.

Presumption of ownership — presumption of solvency.

See BANKING, 1, 5.

Section 830 of the Code of Civil Procedure, relating to the reading on second trial of testimony of deceased witness, taken on first trial, applicable to criminal trials — when right of confrontation is not violated.

See CRIMES, 1, 2.

Perjury — when denial, by witness, of recollection of material facts constitutes perjury — when evidence tending to establish the falsity of his denial is not incompetent as tending to prove other offenses — admissibility of evidence as to the probability of the truth of his denial.

See CRIMES, 3-5.

Trial for murder — finding of weapon — competency — opinion of lay witness — testimony upon which to form basis for conjecture inadmissible — when silence of accused does not establish acquiescence — when knowledge as to impulses of deceased inadmissible — admission — striking out erroneous evidence — dying declarations — admissibility — statements as to previous occurrence.

See CRIMES, 11-15, 17-20.

Acts and conversations of parties inadmissible to contradict deed.

See DEED.

Extradition warrant not conclusive as to facts recited therein.

See EXTRADITION, 8.

When not sufficient to warrant inference of bad faith — credibility of interested witness.

See TRIAL, 3, 4.

EXECUTORS AND ADMINISTRATORS.

Common-law action by — compulsory reference when examination of long account is involved.

See PRACTICE.

Judicial settlement of administrator's accounts void as against interested parties not cited or appearing thereon.

See SURREGATE'S COURT, 1, 2.

EXPERTS.

Testimony of, as to identity of person making marks canceling signature to a will, inadmissible.

See EVIDENCE, 2.

EXTRADITION.

1. *Constitutional Law—Comity.* The extradition from one state to another of a fugitive from justice does not depend on comity or contract, but on the provisions of the Constitution of the United States. *People ex rel. Corkran v. Hyatt.* 176

2. *Fugitive from Justice—Presence in Demanding State.* The constructive presence in the demanding state at the time of the commission of the alleged crime is not sufficient to make the alleged offender a fugitive from justice or extraditable as such, but his actual presence therein at such time is necessary. *Id.*

3. *Sams.* That one not personally present in a state at the date of the commission of the alleged crime of larceny and false pretenses was subsequently present in the state for a single day nearly a year before the institution of any prosecution against him does not entitle such state to demand him from another as a fugitive from justice. *Id.*

4. *Asylum for Criminals.* The doctrine of the necessity of the corporeal presence within a state of an offender at the time of the commission of an alleged offense therein to render him a fugitive from justice and extraditable from another state does not tend to render the several states asylums for criminals who may inflict injury upon persons or property within a state when not actually present therein, since each state has power to punish crimes committed within its borders. *Id.*

5. *Trial—Stipulation—Construction.* A stipulation that an alleged offender sought to be extradited for offenses charged to have been committed on specified dates was not in the demanding state at the time of the offense charged cannot be limited as an admission only that the accused was not in the state at the particular dates alleged in the indictment, but must be construed as an admission of his absence when the crimes were committed, especially where such view is confirmed by the argument of the counsel making the stipulation. *Id.*

6. *Habeas Corpus—Review of Warrant.* The action of the governor of the state in issuing a warrant for the extradition of an alleged fugitive from justice can be reviewed by writ of habeas corpus. *Id.*

7. *Alibi.* Mere proof that one accused of crime and sought to be extradited was not within the demanding state at the time of the commission of the offense, does not necessarily require or justify his discharge in requisition proceedings or on habeas corpus, since the guilt or innocence of an alleged fugitive from justice cannot be determined therein. *Id.*

8. *Evidence—Warrant.* A warrant issued by a governor of a state for the extradition of an alleged offender does not conclusively establish the facts recited therein, but they are to be taken as presumptively true in the first instance. *Id.*

9. *Judicial Knowledge.* On habeas corpus proceedings to inquire into the cause of detention of one held under an extradition warrant, the facts recited in the warrant or stipulated by counsel are all that the court can judicially know concerning the circumstances of the alleged crime, where the record does not contain the indictment or other proof as to the facts. *Id.*

10. *Stipulations—Recitals in Extradition Warrant.* Stipulations or admissions of counsel entered upon the record in a habeas corpus pro-

EXTRADITION — Continued.

ceeding to inquire into the cause of detention of one held under a warrant of extradition, overcome every contrary presumption arising from the facts stated in the warrant. *Id.*

11. *Offender's Presence in Demanding State — Presumption.* The surrender of one accused of crime in another state, in violation of the rule that extradition will be granted only where the offense was committed by one actually present in the demanding state, is not warranted on the theory that it may be shown upon the trial that the accused actually committed the crimes at a later day than laid in the indictment while temporarily in the state for a few hours, where no claim is made that such is the fact. *Id.*

FIREMEN.

Removal of, from position in New York city.

See NEW YORK (CITY OF), 2.

FORECLOSURE.

Action of, after foreclosure of another mortgage on other property given in part as collateral security for debt secured by first mortgage, not prohibited by sections 1628 and 1630 of the Code of Civil Procedure.

See MORTGAGE.

Of chattel mortgage — when restrained on ground of usury.

See USURY.

FORFEITURE.

Of usurious loan.

See USURY.

FORMER ADJUDICATION.

Issue finally determined in a former suit between the parties need not be submitted to the jury.

See TRIAL, 6.

FUGITIVE.

From justice — presence in demanding state.

See EXTRADITION, 2-4, 6, 7-11.

FULTON (VILLAGE OF).

Statute requiring that a voter upon a proposition to establish water works in, or his wife must be a taxpayer is not unconstitutional.

See CONSTITUTIONAL LAW, 1.

HABEAS CORPUS.

Review of warrant — alibi — judicial knowledge — recitals in extradition warrant.

See EXTRADITION, 6, 7, 9, 10.

HANDWRITING.

Testimony of an expert as to identity of person making marks canceling signature to a will, inadmissible — marks not "writings" within meaning of statutes permitting comparison of handwriting by experts.

See EVIDENCE, 2.

HEARING.

As to public improvement.

See MUNICIPAL CORPORATIONS, 4.

HUSBAND AND WIFE.

Action by wife for alienation of husband's affections.

See TRIAL, 10.

INCOME.

When life beneficiary is entitled to stock dividends as income.

See TRUSTS, 1.

INDORSEMENT.

Of notes — accommodation — estoppel.

See BILLS, NOTES AND CHECKS, 1.

INJUNCTION.

To restrain nuisance to leasehold.

See TRIAL, 9.

INSOLVENCY.

When interest not allowed after receivership of insolvent corporation — when preferences take effect and interest ceases.

See CORPORATIONS, 2, 3.

INSURANCE.

1. *Action to Reform Life Insurance Policy and for Judgment Thereon — Parties Defendant* — Code Civil Procedure, §§ 452 and 499. Where a life insurance policy was erroneously, or fraudulently, made payable to the insured, or his legal representatives, instead of to a creditor thereof, for whose benefit the policy was obtained and by whom the premiums were paid, the legal representatives of the insured are necessary parties to an action brought by the creditor, after the death of the insured, against the company to have the policy reformed and made payable to such creditor instead of to the legal representatives of the insured and for judgment upon the policy so reformed for the money due thereunder, and although no attempt was made by defendant to raise the objection, by demurrer or answer, that there was a defect of parties defendant, a motion made at the close of the evidence upon the trial, to dismiss the complaint for such defect of parties, should have been granted unless within a reasonable time the personal representatives of the insured were brought in, not necessarily for the protection of the defendant, for it had neglected its rights, but for the protection of the representatives of the insured as well as the seemly and orderly administration of justice, that there might be a complete determination of the controversy; since section 499 of the Code of Civil Procedure, providing that where "Such an objection is not taken, either by demurrer or answer, the defendant is deemed to have waived it," must be read in connection with section 452, which provides that "Where a complete determination of the controversy cannot be had without the presence of other parties, the court must direct them to be brought in." *Steinbach v. Prudential Ins. Co.* 471

2. *Limitation of Action upon Policy — Waiver.* An action upon a policy of life insurance, which provided that any suit or action thereon should be commenced within six months after the death of the insured, brought after the expiration of such time is barred, unless the provisions of the limitation clause have been waived, although in a previous action, which had been commenced in time, the service of the summons and complaint had been vacated and set aside as unauthorized; the facts that within three or four days after the death of the insured the plaintiff delivered to the defendant the proofs of death, together with the policy and an assignment thereof and that the latter has since retained them, do not establish a waiver. *Sullivan v. Prudential Ins. Co.* 482

Unreasonable amendment of by-laws depriving beneficiary of rights under policy issued by mutual benefit society.

See ASSOCIATIONS, 1.

INTEREST.

When not allowed after receivership of insolvent corporation — when preferences take effect and interest ceases.

See CORPORATIONS, 2, 3.

Usurious loans made by associations for lending money on personal property subject to forfeiture.

See USURY.

INTESTATES.

Distribution of personal property of.

See DECEDENT'S ESTATE.

JUDGMENT.

Conclusiveness. The provisions of a decree concerning a question not necessarily involved in the issues or presented to the court are not final and conclusive upon the parties. *Stokes v. Foote.* 327

Arrest of.

See CRIMES, 10.

Recovered against a corporation — action to enforce against its president personally.

See PLEADING.

JURIES.

Discharge of jury in criminal action.

See CRIMES, 9.

JURORS.

Appointment of commissioner of, in New York county.

See CONSTITUTIONAL LAW, 2.

LABOR LAW.

When contract for public improvement not invalidated by specifications therein requiring compliance with provisions of Labor Law.

See MUNICIPAL CORPORATIONS, 2, 3.

LANDLORD AND TENANT.

1. *Leasing Premises with Knowledge of Existing Nuisance — Tenant's Right of Action for Damages.* A tenant in possession of premises affected by a nuisance under a lease made during the existence of the nuisance, which in this case consisted of the operation of an electric lighting plant, can maintain an action to abate the nuisance and to recover the damages which he may have sustained by reason thereof. *Bly v. Edison Electric Ill. Co.* 1

2. *When Action after Default in Payment of Installments of Rent Cannot Embrace Damages for a Total Breach of Lease — Measure of Damages.* Under a lease demising premises for a specified term at an annual rent payable in equal monthly payments in advance, and providing that if the premises should become vacant during the term the lessor might re-enter and relet them as agent of the lessee, applying the rent, first, to the payment of the expenses of re-entering and then to the payment of the rent due under the lease, the lessee to remain liable for any deficiency; and further providing that, if any default should be made in the payment of the rent, "the said hiring and the relation of landlord and tenant, at the option of the party of the first part, shall wholly cease and determine, and the party of the first part shall and may re-enter, * * * and in such case the party of the second part shall and will pay or cause to be paid to the party of the first part, as damages for the breach of the covenant for rent herein, the difference between the amount of rent hereby reserved and the amount of rents which shall be collected and received, or might with due

LANDLORD AND TENANT — Continued.

diligence be collected and received from the said demised premises during the residue of the said term remaining unexpired at or immediately before the time of such re-entry in equal monthly payments as the amount of such difference shall from time to time be ascertained," when the lessee fails to pay the rent for a specified month and the lessor takes possession under the re-entry clause, an action does not lie for the breach of the lease in its entirety and the recovery of all damages in a single action brought before the expiration of the term, since the defendant's breach consists simply of a failure to pay in monthly installments the money damages stipulated for in the re-entry clause, to be ascertained in accordance with the agreement of the parties, and the remedy as provided therein must be exclusively followed. The plaintiff, however, may maintain an action to recover the rent, as such, for the month specified and may join with it a cause of action for the breach and may recover as damages the deficiency ascertained in the manner provided by the lease for each month thereafter until the commencement of the action; for any deficiency after that date she must resort to another action. *McCready v. Lindenborn*. 400

Liability of landlord for improvements made by tenant.

See LIEN, 1, 2.

LEASE.

Of premises with knowledge of existing nuisance—tenant's right of action for damages.

See LANDLORD AND TENANT, 1.

When action, after default in payment of installments of rent, cannot embrace damages for a total breach of lease.

See LANDLORD AND TENANT, 2.

Liability of landlord for improvements made by lessee.

See LIEN, 1, 2.

Injunction to restrain nuisance to leasehold.

See TRIAL, 9.

LEGISLATION.

Required to make imposition of transfer tax on succession of life tenant fairer.

See TAX, 10.

LIEN.

1. *Mechanic's Lien — Landlord not Liable for Improvements Made by Tenant for Sole Benefit of Tenant under Provisions of Lease.* The owner of land leased for a term of years at a fixed rental to a corporation for a purpose prescribed in the lease, the lessee to have the right to remove at any time before the expiration of the lease all buildings and structures erected by it upon the land, is not liable under the Mechanics' Lien Law (L. 1897, ch. 418, art. 1) for any work done in and upon the buildings erected by the lessee after the execution of the written lease, where there is no evidence that the landowner exercised any control or supervision over the performance of the work and where, under the terms of the lease, the work was in no way in the interest of such owner, notwithstanding the fact that the landowner signed an application to the local authorities to have the premises connected with the city water supply, presumably because of some rule or requirement by the city officials that the application should be made by the owner, since to fall within the provision of the statute the owner must be an affirmative factor in procuring the improvement to be made, or, having possession and control of the premises, assent to the improvement in the expectation that he will reap the benefit of it. *Rice v. Culver*, 60

LIEN — Continued.

2. *Landlord Liable for Improvements Made by Tenant Before Execution of Lease and Before Possession of Property Given to Tenant.* Such owner is liable, however, under the statute, for work done in grading the premises at the instance of the lessee, with the knowledge of the owner, before the date and execution of the lease, where there is no evidence which would justify a finding that the lessee had entered into possession of the premises before the date of the lease, or, that before that time, the owner had surrendered the control and possession of the property to the lessee, since the fact that the owner, being in control and possession of the land, knowingly suffered beneficial improvements to be made upon it renders his property liable for the work. *Id.*

3. *Mechanic's Lien — When Vendor of Real Property Is Not Liable for Buildings Erected by Vendee to whom Possession is Given "for the Purpose of Erecting Buildings Thereon."* Where land sold under an executory contract was retaken by the vendor upon the vendee's default in payment, a person who performed labor and furnished materials for buildings erected upon the land by the vendee while in possession thereof, is not entitled to a judgment enforcing a mechanic's lien thereon against the vendor, where there is no proof that the vendor had any knowledge as to the character of the building to be erected, or of the erection of the building constructed, or that the vendor acquiesced therein, and the only ground relied upon as constituting the vendor's consent to the erection of such building is a provision of the contract that the vendee should have immediate possession of the property "for the purpose of erecting buildings thereon." *Beck v. Catholic University.* 387

LIFE INSURANCE.

Unreasonable amendment of by-laws depriving beneficiary of rights under policy issued by mutual benefit society.

See ASSOCIATIONS, 1.

Action to reform policy of — parties defendant.

See INSURANCE, 1.

Limitation of action upon policy of — waiver.

See INSURANCE, 2.

LIMITATION OF ACTIONS.

1. *Statute of Limitations — Outlawed Claim not Revived by Letter of Debtor Offering to Buy it for a Small Sum.* The liability of an indorser of a note, outlawed by lapse of time, is not revived by a letter from him to the holder of the note stating, in substance, that he is unable to pay the note and offering to buy it, if the holder will sell it for some small sum that he can, in justice to other interests, afford to pay; since such letter contains no promise to pay the note nor is it an acknowledgment of an existing debt. *Connecticut Trust & S. D. Co. v. Weed.* 497

2. *Same — Operation of, Suspended by Non-residence of Debtor, Notwithstanding Casual Visits to the State.* Where a person removed from the State of New York to another state after a cause of action had accrued against him and has since resided in the latter state, such absence suspends the running of the Statute of Limitations against him, notwithstanding the fact that he has made a number of brief visits to the city of New York or to his old residence within this state; the amendment of 1888, changing section 401 of the Code of Civil Procedure so that it reads, "departs from and resides without the State and remains continuously absent therefrom," instead of "or remains continuously absent therefrom," did not alter the rule that non-residence is absence, and that casual visits to the state do not destroy the continuity of the absence. *Id.*

LIMITATION OF ACTIONS — *Continued.*

Upon life insurance policies.

See INSURANCE, 2.

Action against trustee for failure to comply with provisions of mortgage not within twenty years' Statute of Limitations — action for breach of implied legal duties or obligations must be commenced within ten years.

See TRUSTS, 4, 5.

LOAN ASSOCIATIONS.

When shareholder may recover amount named in certificate of stock — terms and conditions of contract not inconsistent with absolute promise to pay amount named in certificate — term "withdrawing shareholders" defined — when application for membership not a necessary part of plaintiff's proof in action to recover upon certificate — *ultra vires* not available as defense when certificate holder has complied with contract in good faith.

See ASSOCIATIONS, 2-6.

LOANS.

Made by associations for lending money on personal property, subject to forfeiture when usurious.

See USURY.

LONG ISLAND CITY.

Removal of fireman appointed under charter of, by fire commissioner of New York city.

See NEW YORK (CITY OF), 2.

MANDAMUS.

When writ not granted to review action of police commissioner in revoking pension of widow of policeman.

See NEW YORK (CITY OF), 1.

Granted to review removal of fireman appointed under charter of Long Island City by fire commissioner of New York city.

See NEW YORK (CITY OF), 2.

Not granted to require board of aldermen to elect veteran to position of assistant sergeant-at-arms.

See NEW YORK (CITY OF), 3.

When will not lie in first instance to compel railroad corporation to operate trains in a designated manner — proper remedy.

See RAILROADS, 1, 2.

Alternative writ — effect of verdict directed at request of both parties.

See TRIAL, 5.

MECHANIC'S LIEN.

Landlord not liable for improvements made, under provisions of lease, by tenant for his sole benefit — landlord liable for improvements made by tenant before execution of lease and before possession of property given to tenant.

See LIEN, 1, 2.

When vendor of real property is not liable for buildings erected by vendee to whom possession is given "for the purpose of erecting buildings thereon."

See LIEN, 3.

MEDICINE.

Practice of — law curing defects in imperfect registration of physicians, retroactive.

See PHYSICIANS AND SURGEONS.

MISJOINDER.

When action after default in payment of installments of rent cannot embrace damages for a total breach of lease.

See LANDLORD AND TENANT, 2.

MORTGAGE.

Action to Foreclose, After Foreclosure of Another Mortgage on Other Property Given in Part as Collateral Security for Debt Secured by First Mortgage, not Prohibited by Code Civ. Pro. §§ 1628, 1630. An action to foreclose two mortgages upon the same property, made by the same mortgagor and held by the same assignee, is not prohibited by sections 1628 and 1630 of the Code of Civil Procedure, notwithstanding that another mortgage given by the same mortgagor upon another property to the same mortgagee to secure the payment of another debt and also as a further and additional security for the debts represented by the first two mortgages, had been foreclosed by such mortgagee and the proceeds of the sale, after paying the expenses of foreclosing the last mortgage, and the amount for which it was given, had been applied upon the payment of the debts secured by the first two mortgages but leaving a deficiency for which no judgment was ever entered or docketed, or execution issued to collect the amount thereof, and that after such sale the mortgagee assigned the first two mortgages without in terms transferring any right to the deficiency, which, however, passed by operation of law to an assignee who thereafter, and without obtaining leave of the court, began the action to foreclose the first two mortgages; since the deficiency judgment, if one had been entered and docketed, would not have been a "final judgment for the plaintiff * * * in an action to recover any part of the mortgage debt" secured by the first two mortgages and no action has been brought to recover any part of such mortgage debt, within the meaning of the statute, for the reason that the suit to foreclose the mortgagor's equity of redemption in the property covered by the last mortgage was not such an action. *Reichert v. Stilwell.* 88

Liability of trustee to bondholders for failure to comply with provisions of mortgage — action against trustee for breach of implied legal duties or obligations.

See TRUSTS, 4, 5.

Chattels — when association restrained from foreclosing on ground of usury.

See USURY.

MUNICIPAL CORPORATIONS.

1. *Public Improvements — Specifications — Guaranty of Payment.* It seems, that a provision in the specifications of the work to be done for paving a street, that the contractor will keep it in repair without expense to the city, for a period of eight years, does not place the cost of repairing upon adjacent property owners, but is a guaranty as to the quality and character of the pavement. *People ex rel. North v. Featherstonhaugh.* 112

2. *Contracts — Labor Law.* It seems, that a contract for curbing and paving a street is not invalid because the specifications therefor require bidders to observe the provisions of the Labor Law, a part of which was declared unconstitutional before the bids were made, where the contract only provided for compliance with such provisions of the Labor Law as were in force, when the price for the work was not increased by reason of such provisions and the contract would stand unimpaired if the unconstitutional part of the Labor Law were eliminated from the specifications. *Id.*

MUNICIPAL CORPORATIONS — Continued.

3. *Same. It seems*, that a provision incorporated in the specifications for a street improvement that workmen must in conformity with the Labor Law be paid in cash, and not in store orders, is not unreasonable or illegal when it is required by the statute. *Id.*

4. *Paving—Hearing. It seems*, that the proceedings of a public improvement commission are not rendered invalid because abutting property owners were not given an opportunity to be again heard after the determination of the commissioners to pave with asphalt and curb with granite, although at the time of the hearing granted it was intended to pave with brick, where such hearing covered all matters pertaining to the improvement and the commission had power by statute to change their determination as to the character of the pavement. *Id.*

5. *Provisions of Chapter 754 of Laws of 1897, Amending Section 61 of Railroad Law, Must Be Complied with, Although Proceeding to Lay Out Street across Railroad Tracks Was Commenced before Enactment of Statute.* The provisions of chapter 754 of the Laws of 1897, amending section 61 of the Railroad Law (L. 1890, ch. 565), are intended to require the steps named therein to be taken by municipalities in the laying out of streets across railroads in addition to the requirements of their several charters and existing general law; and the determination of the authorities of a city, in a proceeding to lay out a street across the tracks of a steam railroad, although initiated by petitioners before the enactment of the statute, and in conformity with the charter, but not acted upon by the common council otherwise than by reference to the board of street opening until after the statute took effect, is ineffectual to authorize subsequent proceedings taken under such determination, where no opportunity was given to the railroad corporation to be heard before the municipal authorities upon the question of the necessity of such street, and no application was made to the board of railroad commissioners for permission to lay out such street across the railroad tracks, as required by the statute. *Matter of Ludlow Street.* 542

Payments of public moneys to charitable institutions wholly or partly under private control.

See CHARITABLE INSTITUTIONS, 1, 2.

MURDER.

Trial — former jeopardy — question of fact — discharge of jury — new trial — arrest of judgment — evidence — finding of weapon — competency — opinion of lay witness — testimony upon which to form a basis for conjecture inadmissible — when silence of accused does not establish acquiescence — when knowledge as to impulses of deceased inadmissible — admission — erroneous evidence — striking out — dying declarations — admissibility — previous occurrence — reversible error — burden of showing improper evidence harmless rests on prosecution.

See CRIMES, 8-22.

NATIONAL BANKS.

Assessment of stock of, at higher ratio of value than real estate — when equity will not restrain collection of tax.

See TAX, 2.

NEW YORK (CITY OF).

1. *Mandamus — Brooklyn (City of) — Pensions to Widows of Members of the Police Department — L. 1888, Ch. 583.* The provision of the charter of the city of Brooklyn (L. 1888, ch. 583, tit. 11, § 42) authorizing the granting of a pension to the widow of any member of the police force or attache of the police department who shall have died after ten years of service in the police department of that city and providing that the commissioner of police may in his discretion revoke any pension granted or

NEW YORK (CITY OF) — Continued.

any part thereof, "except to members of the police force and attaches retired after twenty years' service," does not authorize the granting of a pension to the widow of a policeman who had been retired upon a pension after twenty years' service and who had died several years before the enactment of the statute, since such policeman was not a member of the police department at the time of his death and the statute is not retroactive; if the statute could be construed to cover such case, it would be unconstitutional as an appropriation of public moneys to purely private purposes. The widow of such policeman, therefore, is not entitled to a mandamus requiring the police commissioner of the city of New York to revoke his revocation of a pension previously granted to her under the statute. *People ex rel. Waddy v. Partridge.* 305

2. *Civil Service — Long Island City — Removal of Fireman Appointed under Charter of, by Fire Commissioner of Greater New York — Mandamus.* Where the power of appointing firemen was given by the charter of Long Island City to the board of fire commissioners, subject only to the limitation that the annual expenses of the department should not exceed a certain sum, a fireman, who was appointed by such board, after a successful civil service examination, has the right to retain his position until removed for cause upon notice and a hearing, and where he has been summarily removed by the fire commissioner appointed under the new charter of the city of New York, by which Long Island City was absorbed by the greater city, upon the ground that his appointment was illegal, he is entitled to a writ of mandamus requiring such commissioner to restore him to his position upon proof of his appointment by the board of commissioners of Long Island City, unless it is shown as a matter of defense by the commissioner removing him that the limitation prescribed by the charter of Long Island City was exceeded; and when such commissioner did not ask to go to the jury upon that question, the verdict directed for the relator has all the effect of a finding to the contrary. *People ex rel. Gleason v. Scannell.* 316

3. *Power of Board of Aldermen to Elect Its Own Officers and Appointees Not Restricted by Statutory Provisions Relating to Veteran Soldiers and Civil Service Positions.* A veteran soldier, who was an assistant sergeant-at-arms to the council of the city of New York when the council was abolished and its powers and duties imposed upon the board of aldermen by the new charter of the city (L. 1901, ch. 466), is not entitled to a writ of mandamus requiring the board of aldermen to elect him to the position of assistant sergeant-at-arms to that body, under the statute giving preference to veteran soldiers (L. 1899, ch. 370, § 21), or the provision of the charter (§ 1543) requiring that any clerk or employee of any department of the city whose position or employment may be abolished by the abolition of any department, or its consolidation with another, shall be reinstated in the same or a similar position or employment in another department, since the board of aldermen is a legislative body, with power to elect its own officers and attendants, untrammelled by the provisions of the statutes invoked by the relator, which were intended to govern appointments in the various departments of the civil service of the city, and have no application to elective officers or appointees. *Matter of Shaughnessy v. Fornes.* 323

Provision of charter of New York Juvenile Asylum requiring payment by the city and county of New York for the support of inmates not committed to it in accordance with rules of state board of charities, superseded by the Constitution.

See CHARITABLE INSTITUTIONS, 2.

Review of assessments for taxation in.

See TAX, 1, 2.

NEW YORK (COUNTY OF).

Appointment of commissioner of jurors in.

See CONSTITUTIONAL LAW, 2.

NONSUIT.

Presumption from.

See APPEAL, 8.

NOTES.

Promissory — erroneous certification, of which holder is immediately notified — when paid through clearing house, amount thereof may be recovered from bank receiving it.

See BANKING, 8.

Accommodation indorsement — estoppel — bad faith.

See BILLS, NOTES AND CHECKS, 1, 2.

Parol evidence inadmissible to show that note, absolutely delivered at date thereof, was not to be paid upon the happening of a subsequent contingency.

See EVIDENCE, 1.

Outlawed note not revived by letter of indorser offering to buy it for a small sum.

See LIMITATION OF ACTIONS, 1.

Discount by bank — good faith.

See TRIAL, 2, 3.

NUISANCE.

Tenant's right of action for damages.

See LANDLORD AND TENANT, 1.

To leasehold — injunction to restrain.

See TRIAL, 9.

OFFICERS.

Appointment of commissioner of jurors in New York county.

See CONSTITUTIONAL LAW, 2.

Action to enforce judgment recovered against a corporation, against its president personally.

See PLEADING.

ORDERS.

Order of Appellate Division cannot be reviewed upon appeal taken direct from decree of Surrogate's Court made after and in accordance with such order.

See APPEAL, 9.

OWNERSHIP.

Presumption of.

See BANKING, 1.

PARTIES.

Defendant in action to reform life insurance policy.

See INSURANCE, 1.

PARTNERSHIP.

Accommodation indorsement of note — estoppel.

See BILLS, NOTES AND CHECKS, 1.

PAWNBROKERS.

Statute providing for incorporation of associations for lending money on personal property must be construed with and is subject to statutes relating to usury — usurious loans made by such associations subject to penalty of forfeiture.

See USURY.

PENSIONS.

To widows of policemen — revocation — when mandamus not granted.

See NEW YORK (CITY OF), 1.

PERJURY.

When denial, by witness, of recollection as to material facts constitutes perjury.

See CRIMES, 3-7.

PERSONAL PROPERTY.

Of intestate — distribution.

See DECEDENT'S ESTATE.

Lending money on — usurious loans subject to forfeiture.

See USURY.

PHYSICIANS AND SURGEONS.

Public Health Law — L. 1893, Ch. 661, § 148, *Curing Defects in Imperfect Registration of Physicians, Retroactive*. Where a physician, who came from another state and possessed all the qualifications required by the statute for the practice of medicine in this state, upon his registration in 1886, through inadvertence, omitted to file with his affidavit the indorsement of a medical school in the state, as required by the statute (L. 1880, ch. 513, § 4), the effect of which was to render the registration imperfect, the registration in 1899 of a regents' certificate curing the defect, issued pursuant to section 148 of the Public Health Law (L. 1893, ch. 661), validates the original registration from the date of its filing, wipes out all liability to prosecution for the various misdemeanors committed by him in practicing during the time of imperfect registration, and renders legal his contracts of employment. *Ottaway v. Lowden*. 129

PLEADING.

Action to Enforce Judgment, Recovered against a Corporation, against its President Personally — *When Allegations of Complaint Do Not State Facts Constituting a Cause of Action*. An action upon an unsatisfied judgment, obtained against a foreign corporation for injury to property caused by its negligence, cannot be maintained against the president of the corporation personally, upon a complaint alleging that process in the action in which the judgment was obtained was served upon him as president of such corporation, and that as such officer he caused the suit to be defended, and was personally cognizant of all the steps in the litigation; that, at the time of the injuries to plaintiffs' property and during the action in which such judgment was obtained, the corporation was a myth and did not exist, because the organization required by the law under which the corporation was organized was not kept up, and that during such time its president was the real owner and in possession of the property, and the real party engaged in the business of the corporation; since the defendant did not make himself personally liable by defending the action in which the judgment was obtained as president of the corporation, nor can he be personally charged with the payment of a judgment recovered in an action against it to which he was not a party, where he is not charged with any personal negligence resulting in the injuries constituting the basis of the judgment sued upon in the present action; and hence he cannot be compelled to try that question in a court of equity upon a complaint which does not charge it. *Tilley v. Coykendall*. 557

PLEDGE.

Of property as security.

See TRUSTS, 2, 3.

POLICE.

Pensions to widows of policemen — revocation — when mandamus not granted.

See NEW YORK (CITY OF), 1.

POLICY.

Of insurance issued by mutual benefit society — unreasonable amendment of by-laws.

See ASSOCIATIONS, 1.

Of life insurance — action to reform — parties defendant.

See INSURANCE, 1.

Limitation of action upon — waiver.

See INSURANCE, 2.

PRACTICE.

1. *Common-law Action by Executor or Administrator — Compulsory Reference when Examination of Long Account Is Involved.* The constitutional and legislative provisions relating to the question as to whether a compulsory reference may be ordered in a common-law action brought by an executor or administrator reviewed, and it seems that if independent issues are raised by the pleadings or issues, the determination of which may render an accounting unnecessary, they should be first tried before a jury, and if upon its determination an accounting is necessary, and it appears that the trial will necessarily involve the examination and auditing of a long account, the plaintiff is not entitled to a jury trial, but the court has power to order a compulsory reference. *Malone v. St. Peter and Paul's Church.* 269

Action to foreclose mortgage, after foreclosure of another mortgage on other property given in part as collateral security for debt secured by first mortgage, not prohibited by sections 1628 and 1630 of the Code of Civil Procedure.

See MORTGAGE.

Upon proceeding for new accounting of administrator by interested party not cited.

See SURROGATE'S COURT, 2.

Of asking witnesses questions, which counsel knows cannot be answered, condemned.

See TRIAL, 11.

PREFERENCE.

Insolvent corporation — when preferences take effect and interest ceases.

See CORPORATIONS, 2, 3.

PRINCIPAL AND SURETY.

Indemnity.

See TRUSTS, 3.

PROMISSORY NOTES.

Erroneous certification, of which holder is immediately notified — when paid through clearing house, amount thereof may be recovered from the bank receiving it.

See BANKING, 8.

When cannot be contradicted by parol evidence.

See EVIDENCE, 1.

PUBLIC HEALTH.

Law curing defects in imperfect registration of physicians, retroactive.

See PHYSICIANS AND SURGEONS.

PUBLIC IMPROVEMENTS.

Contract for—specifications—guaranty of payment—Labor Law—paving—hearing.

See MUNICIPAL CORPORATIONS, 1-4.

QUESTION OF FACT.

When defense of irresponsibility for denial of recollection is a question of fact.

See CRIMES, 6.

Former jeopardy.

See CRIMES, 8.

QUESTION OF LAW.

When not raised.

See APPEAL, 4.

When raised by direction of verdict.

See APPEAL, 5.

Construction of contract.

See TRIAL, 7.

RAILROADS.

1. *Railroad Law — Railroad Corporations Cannot, in the First Instance, Be Compelled by Mandamus to Operate Trains in a Designated Manner.* Mandamus will not lie in the first instance upon the application of persons claiming to be aggrieved by the manner in which a railroad company operates its trains, to compel it to restore a continuous train service to a specified station, which service had been partially abandoned, since the Railroad Law (L. 1890, ch. 565) enjoins no such duty upon the company, but instead submits the responsibility of determining how many trains shall be run and at what intervals of time to its board of directors. *People ex rel. Lanton v. Brooklyn Heights R. R. Co.* 90

2. *Directors' Abuse of Discretion in Operating Road May Be Remedied by Board of Railroad Commissioners, whose Determination May Be Enforced by Mandamus and Is Reviewable by Certiorari.* In the event, however, of an abuse of the discretion committed to the board of directors in operating the road, complaint may be made to the Board of Railroad Commissioners, which has express authority to determine, upon notice and after a hearing, whether the "mode of operating the road and conducting its business is reasonable and expedient, in order to promote the security, convenience and accommodation of the public" (Railroad Law, § 161), and such determination is enforceable in the courts by mandamus (§ 162) and is reviewable by certiorari, on which review the Appellate Division has the power, and upon it rests the duty, of examining the facts. *Id.*

3. *When the Right to Select New Terminus and Extend Existing Railroad into an Adjoining County Is Limited.* Section 13 of the Railroad Law (L. 1890, ch. 565), providing that "Every railroad corporation, except elevated railway corporations, may, by a vote of two-thirds of all its directors, alter or change the route or any part of the route of its road or its termini, or locate such route, or any part thereof, or its termini, in a county adjoining any county named in its certificate of incorporation, if it shall appear to them that the line can be improved thereby, upon making and filing in the clerk's office of the proper county a survey, map and certificate of such alteration or change," etc., does not permit a railroad corporation to select a new terminus for its railroad in an adjoining

RAILROADS — *Continued.*

county seven miles beyond its original terminus and extend its railroad thereto where the change or improvement contemplated is not one for the purpose of benefiting the line located by the articles of association, has no reference to some feature of the line itself, such as an easier grade or a lessened cost of construction and maintenance, but is a mere reaching out into another county for the purpose of increasing the business of the road. *Matter of G. & J. Ry. Co. v. G. & S. El. R. R.* 462

Proceeding to lay out street across tracks.

See MUNICIPAL CORPORATIONS; 5.

Mortgage — liability of trustee to bondholders for failure to comply with provisions of mortgage — action against trustee for breach of implied legal duties or obligations.

See TRUSTS, 4, 5.

REAL PROPERTY.

Restriction as to use of premises for a saloon when removed by quit-claim deed.

See DEED.

Liability of landlord for improvements made by tenant.

See LIEN, 1, 2.

When vendor of, who retakes same, is not liable for buildings erected thereon by vendee.

See LIEN, 3.

Action to foreclose mortgage, after foreclosure of another mortgage on other property given in part as collateral security for debt secured by first mortgage, not prohibited by sections 1628 and 1630 of the Code of Civil Procedure.

See MORTGAGE.

Illegal assessment — land cannot be reassessed without notice.

See TAX, 5.

RECEIVERS.

Of insolvent corporations — when interest not allowed after appointment of.

See CORPORATIONS, 2, 3.

REFERENCE.

Compulsory, when examination of long account is involved in common-law action by executor or administrator.

See PRACTICE, 1.

REGISTRATION.

Of physicians — law curing defect in, retroactive.

See PHYSICIANS AND SURGEONS.

REMAINDERS.

Contingent — transfer tax upon, payable forthwith out of property transferred — method of imposing tax.

See TAX, 3, 4.

Transfer tax on succession of life tenant.

See TAX, 6.

RES ADJUDICATA.

Issue finally determined in a former suit between the parties need not be submitted to the jury.

See TRIAL, 6.

RESCISSION.

Action for — when parol proof inadmissible in, to explain or contradict written contract.

See EVIDENCE, 3.

REVERSAL.

When Appellate Division has no power to reverse upon the facts.

See APPEAL, 1.

REVIEW.

When Appellate Division has no power to review or reverse upon the facts.

See APPEAL, 1.

When no question raised for review by Court of Appeals.

See APPEAL, 4.

When Court of Appeals not precluded from reviewing evidence by unanimous affirmance in Appellate Division.

See APPEAL, 5.

When unanimous affirmance by Appellate Division of judgment entered upon verdict is not reviewable by Court of Appeals.

See APPEAL, 6.

Order of Appellate Division cannot be reviewed upon appeal taken direct from decree of Surrogate's Court made after and in accordance with such order.

See APPEAL, 9.

When conclusions of law found in support of decree settling an intestate's estate reviewable in Court of Appeals.

See APPEAL, 11.

REVISED STATUTES.

1. R. S. 771—*Pawnbrokers*—Chapter 326 of Laws of 1895, Providing "for the Incorporation of Associations for Lending Money on Personal Property" Must Be Construed with and Is Subject to Statutes Relating to Usury—*Usurious Loans Made by Such Associations Subject to Penalty of Forfeiture*. The statutes relating to usury (1 R. S. 771, and amendments thereto) are not repealed as to corporations formed under chapter 326 of the Laws of 1895, providing "for the incorporation of associations for lending money on personal property * * *" and authorizing such corporations to "take as security for the payment of any such loan either a pledge or a mortgage of any personal property," and to "charge and receive upon each loan * * * interest or discount at a rate not exceeding three per centum per month for a period of two months or less, and not exceeding two per centum per month for any period after said two months;" the effect of the two statutes, when read together, is to increase the rate of interest upon loans covered by the later statute and to apply the penalty of forfeiture prescribed by the Usury Act if the rate so authorized is exceeded; and a person who has borrowed money upon notes secured by chattel mortgages from a corporation organized and doing business under such statute may, upon proof that the corporation has exacted interest and charges upon the loan in excess of the amounts allowed by the statute, maintain an action to have the loan declared void, the notes and mortgages surrendered and the corporation restrained, *pendente lite*, from foreclosing the mortgages. *Lowry v. Collateral Loan Assn.* 394

SESSION LAWS.

1. 1851, Ch. 832—*New York Juvenile Asylum*—*Charter Provision Requiring Payment by the City and County of New York for the Support of*

SESSION LAWS — *Continued.*

Inmates Not Committed to It in Accordance with Rules of State Board of Charities, Superseded by the Constitution. The fact that the New York Juvenile Asylum, a private charitable institution, was authorized by its charter (L. 1851, ch. 332) to take under its care the management of such children as should by the consent, in writing, of their parents or guardians, be voluntarily surrendered and intrusted to it, and by section 28 of chapter 245 of the Laws of 1866 might require the county of New York to pay annually a specified sum for the support of children so committed to it, which section was incorporated into the charter of Greater New York (L. 1897, ch. 378, § 230) and has not in terms been repealed, amended or modified, does not authorize the city and county of New York to pay for the support and maintenance of any inmate not received and retained therein pursuant to the rules of the state board of charities, since such payment is prohibited, not by the rules effecting the repeal or amendment of the statute conferring the right thereto, but by the Constitution itself, which superseded the statute and operated presently from the time the rules were established. *Matter of New York Juvenile Asylum.* 50
1866, Ch. 245. See par. 1, this title.

3. 1872, Ch. 868 — *When Preferences Take Effect and Interest Ceases.* Under the provisions of the charter of an insolvent trust company (L. 1872, ch. 868; L. 1884, ch. 260, § 3), that "in case of the dissolution of the said company by the legislature, the Supreme Court, or otherwise, the debts due from the company as trustee, guardian, receiver or depository of money in court or of savings banks funds shall have a preference," as well as under a similar provision of the General Banking Law (L. 1892, ch. 689, § 130), preferences take effect upon the appointment of a receiver, but preferred creditors are not entitled, upon the settlement of the receiver's accounts and the distribution of the funds in his hands, to any interest, contractual or as damages, upon their claims, from the date of the appointment of the receiver, interest is payable to all creditors if the assets are sufficient; if not interest ceases upon their claim, whether preferred or unpreferred from the date of such appointment. *People v. American Loan & Trust Co.* 371

8. 1874, Ch. 610; 1877, Ch. 193 — *Tax — Illegal Assessment in Westchester County — Land Cannot Be Reassessed without Notice.* An assessment of real estate located in Westchester county, which has been declared illegal by the Supreme Court and ordered stricken from the roll because the name of the non-resident owner had been placed in the first column of the roll among the names of residents, is not an unpaid tax within the meaning of section 3 of chapter 610 of the Laws of 1874, as amended by chapter 193 of the Laws of 1877, authorizing the town board to "examine the account of unpaid taxes" returned to the supervisor by the collector, and, after adding certain percentages, to "reject all taxes on land so imperfectly described or so erroneously assessed that the collection thereof cannot be legally enforced," and authorizing a reassessment by the board of supervisors at their next annual meeting, since the assessment, having been stricken from the roll by a decree of the court, there was no "unpaid tax" to be returned by the collector or presented by the supervisor to the board, and under such circumstances a so-called reassessment must be regarded as a new and original assessment which cannot be properly made without notice to the landowner. *Matter of Douglas v. Bd. Suprs. Westchester Co.* 309

4. 1880, Ch. 36 — *Evidence — Handwriting — Testimony of an Expert as to Identity of Person Making Marks Canceling Signature to a Will, Inadmissible — Marks not "Writings" Within Meaning of Statutes Permitting Comparison of Handwriting by Experts.* When the only question of fact presented for the determination of the court upon the probate of a will is whether the testator's signature thereto was canceled by him, with the intention of revoking his will, by fourteen nearly perpendicular marks

SESSION LAWS — Continued.

drawn across the letters of his signature, the testimony of an expert in inks and handwriting, that, judging from the signatures of the testator appearing on the will, such marks were not made by the same person who wrote the signature to the will, is inadmissible, since such marks are not "writings" within the meaning of the statutes (L. 1890, ch. 86, amd. L. 1888, ch. 555) which permit the comparison of writings by experts, and mere marks or scratches, used either perpendicularly or horizontally over a signature for the purpose of cancelling it, do not contain the characteristics necessary in the formation of letters to enable an expert, or any person, to speak with any degree of certainty with reference to the identity of the person who made the marks. *Matter of Hopkins*. 360

1890, *Ch.* 513. See par. 11, this title.

5. 1882, *Ch.* 410 — *Tax — New York City — Power of Equity to Restrain Collection of Tax when no Remedy Exists at Law*. While the provisions of the Consolidation Act (L. 1882, ch. 410, §§ 819-821, as amd. by L. 1885, ch. 311) for the review by certiorari of assessments made in the city of New York are exclusive, the common-law writ of certiorari for that purpose having been superseded thereby, and the statute affording relief only where an assessment is illegal or erroneous by reason of overvaluation, a court of equity has inherent power in a proper case to restrain the collection of the tax imposed upon grounds not provided for by the statute, and for which no relief can be had by certiorari; it is not its province, however, to interfere in a case where the grievance assigned does not relate to some question of fraud or of illegal discrimination or classification. *Mercantile Nat. Bank v. Mayor, etc., of N. Y.* 365

1884, *Ch.* 260. See par. 2, this title.

1885, *Ch.* 311. See par. 5, this title.

1888, *Ch.* 555. See par. 4, this title.

6. 1888, *Ch.* 588 — *Brooklyn Charter — Mandamus — Brooklyn (City of — Pensions to Widows of Members of the Police Department*. The provision of the charter of the city of Brooklyn (L. 1888, ch. 588, tit. 11) § 42) authorizing the granting of a pension to the widow of any member of the police force or attache of the police department who shall have died after ten years of service in the police department of that city and providing that the commissioner of police may in his discretion revoke any pension granted or any part thereof, "except to members of the police force and attaches retired after twenty years' service," does not authorize the granting of a pension to the widow of a policeman who had been retired upon a pension after twenty years' service and who had died several years before the enactment of the statute, since such policeman was not a member of the police department at the time of his death and the statute is not retroactive; if the statute could be construed to cover such case, it would be unconstitutional as an appropriation of public moneys to purely private purposes. The widow of such policeman, therefore, is not entitled to a mandamus requiring the police commissioner of the city of New York to revoke his revocation of a pension previously granted to her under the statute. *People ex rel. Waddy v. Partridge*. 305

7. 1890, *Ch.* 565 — *Railroad Law — Railroad Corporations Cannot, in the First Instance, Be Compelled by Mandamus to Operate Trains in a Designated Manner*. Mandamus will not lie in the first instance upon the application of persons claiming to be aggrieved by the manner in which a railroad company operates its trains, to compel it to restore a continuous train service to a specified station, which service had been partially abandoned, since the Railroad Law (L. 1890, ch. 565) enjoins no such duty upon the company, but instead submits the responsibility of determining how many trains shall be run and at what intervals of time to its board of directors. *People ex rel. Linton v. Brooklyn Heights R. R. Co.* 90

SESSION LAWS — Continued.

8. *Idem* — *Directors' Abuse of Discretion in Operating Road May Be Remedied by Board of Railroad Commissioners, whose Determination May Be Enforced by Mandamus and Is Reviewable by Certiorari.* In the event, however, of an abuse of the discretion committed to the board of directors in operating the road, complaint may be made to the Board of Railroad Commissioners, which has express authority to determine, upon notice and after a hearing, whether the "mode of operating the road and conducting its business is reasonable and expedient, in order to promote the security, convenience and accommodation of the public" (Railroad Law, § 161), and such determination is enforceable in the courts by mandamus (§ 162) and is reviewable by certiorari, on which review the Appellate Division has the power, and upon it rests the duty, of examining the facts. *Id.*

9. *Idem* — *When Right to Select New Terminus and Extend Existing Railroad into an Adjoining County Is Limited.* Section 18 of the Railroad Law (L. 1890, ch. 565), providing that "Every railroad corporation, except elevated railway corporations, may, by a vote of two-thirds of all its directors, alter or change the route or any part of the route of its road or its termini, or locate such route, or any part thereof, or its termini, in a county adjoining any county named in its certificate of incorporation, if it shall appear to them that the line can be improved thereby, upon making and filing in the clerk's office of the proper county a survey, map and certificate of such alteration or change," etc., does not permit a railroad corporation to select a new terminus for its railroad in an adjoining county seven miles beyond its original terminus and extend its railroad thereto where the change or improvement contemplated is not one for the purpose of benefiting the line located by the articles of association, has no reference to some feature of the line itself, such as an easier grade or a lessened cost of construction and maintenance, but is a mere reaching out into another county for the purpose of increasing the business of the road. *Matter of Greenwich & J. Ry. Co. v. Greenwich & S. El. R. R.* 462

See, also, par. 16, this title.

10. 1891, Ch. 215 — *Transfer Tax Act — Interest of Deceased Shareholder Subject to Transfer Tax.* The interest of a deceased shareholder in the realty of a joint stock association is personal property, and under chapter 215 of the Laws of 1891 a bequest thereof is subject to the transfer tax. *Matter of Jones.* 575

1892, Ch. 689. See par. 2, this title.

11. 1893, Ch. 661 — *Public Health Law, Curing Defects in Imperfect Registration of Physicians, Retroactive.* Where a physician, who came from another state and possessed all the qualifications required by the statute for the practice of medicine in this state, upon his registration in 1886, through inadvertence, omitted to file with his affidavit the indorsement of a medical school in the state, as required by the statute (L. 1880, ch. 513, § 4), the effect of which was to render the registration imperfect, the registration in 1899 of a regents' certificate curing the defect, issued pursuant to section 148 of the Public Health Law (L. 1893, ch. 661), validates the original registration from the date of its filing, wipes out all liability to prosecution for the various misdemeanors committed by him in practicing during the time of imperfect registration, and renders legal his contracts of employment. *Ottaway v. Lowden.* 129

12. 1895, Ch. 326 — *Pawnbrokers — Statute Providing "for the Incorporation of Associations for Lending Money on Personal Property" Must Be Construed with and Is Subject to Statutes Relating to Usury — Usurious Loans Made by Such Associations Subject to Penalty of Forfeiture.* The statutes relating to usury (1 R. S. 771, and amendments thereto) are not repealed as to corporations formed under chapter 326 of the Laws of 1895, providing "for the incorporation of associations for lending money on

SESSION LAWS—*Continued.*

personal property * * * and authorizing such corporations "to take as security for the payment of any such loan either a pledge or a mortgage of any personal property," and to "charge and receive upon each loan * * * interest or discount at a rate not exceeding three per centum per month for a period of two months or less, and not exceeding two per centum per month for any period after said two months;" the effect of the two statutes, when read together, is to increase the rate of interest upon loans covered by the later statute and to apply the penalty of forfeiture prescribed by the Usury Act if the rate so authorized is exceeded; and a person who has borrowed money upon notes secured by chattel mortgages from a corporation organized and doing business under such statute may, upon proof that the corporation has exacted interest and charges upon the loan in excess of the amounts allowed by the statute, maintain an action to have the loan declared void, the notes and mortgages surrendered and the corporation restrained, *pendente lite*, from foreclosing the mortgages. *Lowry v. Collateral Loan Assn.* 394

13. 1895, *Ch.* 754; 1896, *Ch.* 546—*Charitable Institutions—Payments of Public Moneys to Institutions Wholly or Partly under Private Control—Rules of the State Board of Charities.* A municipal corporation is prohibited by the Constitution (Art. 8, § 14) and the statutes (L. 1895, ch. 754; L. 1896, ch. 546, § 9, subd. 8), from paying public moneys to a charitable institution wholly or partly under private control, for the care, support and maintenance of inmates who are not received and retained therein pursuant to the rules established by the state board of charities for the purpose of determining whether such inmates are properly a public charge. *Matter of N. Y. Juvenile Asylum.* 50

1896, *Ch.* 908. See pars. 19 and 21, this title.

1897, *Ch.* 284. See par. 19, this title.

1897, *Ch.* 378. See par. 1, this title.

14. 1897, *Ch.* 418—*Mechanics' Lien Law—Landlord Not Liable for Improvements Made by Tenant for Sole Benefit of Tenant under Provisions of Lease.* The owner of land leased for a term of years at a fixed rental to a corporation for a purpose prescribed in the lease, the lessee to have the right to remove at any time before the expiration of the lease all buildings and structures erected by it upon the land, is not liable under the Mechanics' Lien Law (L. 1897, ch. 418, art. 1) for any work done in and upon the buildings erected by the lessee after the execution of the written lease, where there is no evidence that the landowner exercised any control or supervision over the performance of the work and where, under the terms of the lease, the work was in no way in the interest of such owner, notwithstanding the fact that the landowner signed an application to the local authorities to have the premises connected with the city water supply, presumably because of some rule or requirement by the city officials that the application should be made by the owner, since to fall within the provision of the statute the owner must be an affirmative factor in procuring the improvement to be made, or having possession and control of the premises, assent to the improvement in the expectation that he will reap the benefit of it. *Rice v. Culver.* 60

15. *Idem*—*Landlord Liable for Improvements Made by Tenant Before Execution of Lease and Before Possession of Property Given to Tenant.* Such owner is liable, however, under the statute, for work done in grading the premises at the instance of the lessee, with the knowledge of the owner, before the date and execution of the lease, where there is no evidence which would justify a finding that the lessee had entered into possession of the premises before the date of the lease, or that before that time the owner had surrendered the control and possession of the property to the lessee, since the fact that the owner, being in control and possession

SESSION LAWS — Continued.

of the land, knowingly suffered beneficial improvements to be made upon it renders his property liable for the work. *Id.*

16. 1897, Ch. 754 — *Railroads — Provisions of Law Must Be Complied with, although Proceeding to Lay Out Street Across Railroad Tracks Was Commenced before Enactment of Statute.* The provisions of chapter 754 of the Laws of 1897, amending section 61 of the Railroad Law (L. 1890, ch. 565), are intended to require the steps named therein to be taken by municipalities in the laying out of streets across railroads in addition to the requirements of their several charters and existing general law; and the determination of the authorities of a city, in a proceeding to lay out a street across the tracks of a steam railroad, although initiated by petitioners before the enactment of the statute, and in conformity with the charter, but not acted upon by the common council otherwise than by reference to the board of street opening until after the statute took effect, is ineffectual to authorize subsequent proceedings taken under such determination, where no opportunity was given to the railroad corporation to be heard before the municipal authorities upon the question of the necessity of such street, and no application was made to the board of railroad commissioners for permission to lay out such street across the railroad tracks, as required by the statute. *Matter of Ludlow Street.* 542

17. 1898, Ch. 269 — *Villages — Constitutional Law — A Statute Requiring that a Voter for a Proposition to Establish Water Works in the Village of Fulton and Issue Bonds Therefor, or His Wife, Must Be a Taxpayer, Is Not Unconstitutional.* The provision of the statute (L. 1898, ch. 269, art. 2, § 5) defining the qualifications of voters in the village of Fulton and requiring that a voter, in order to vote upon a proposition that the village establish a system of water works and issue bonds for that purpose, "must be entitled to vote for an officer, and he or his wife must also be the owner of property in the village, assessed upon the last preceding assessment roll thereof," is not in conflict with section 1 of article 2 of the Constitution of the state, defining the qualifications of electors of the state and providing that such electors shall be entitled to vote "for all officers that now are or hereafter may be elective by the people; and upon all questions which may be submitted to the vote of the people;" since such provision must be construed in connection with section 1 of article 12 of the Constitution, which provides that "It shall be the duty of the Legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and in contracting debt by such municipal corporations," and so construed, the first provision is general and relates only to the general governmental affairs of the state; the latter is local and relates to the business or private affairs of the municipalities specified, and the statute is in accordance with the established policy of the state to limit the right of suffrage as to the business or financial affairs of its various villages to the taxpayers of the municipality, and is fully justified by, and not in conflict with, the provisions of the organic law. *Spitzer v. Village of Fulton.* 285

18. 1898, Ch. 319 — *Surrogate's Court — Distribution of Personal Property of Intestate Leaving Nephew and Niece and Uncles and Aunts and Descendants of Deceased Uncles and Aunts.* Subdivision 12 of section 2732 of the Code of Civil Procedure, as amended by chapter 319 of the Laws of 1898, providing that in the distribution of personal property of decedents, "Representation shall be admitted among collaterals in the same manner as allowed by law in reference to real estate," must be construed with subdivision 5 of such section, providing that "If there be no widow, and no children, and no representatives of a child, the whole surplus shall be distributed to the next of kin, in equal degree to the deceased and their legal representatives," and with subdivision 10 of such section,

SESSION LAWS — Continued.

which provides that "When the descendants, or next of kin of the deceased, entitled to share in his estate, are all in equal degree to the deceased, their shares shall be equal;" and where an intestate, leaving personal property only, is survived by a nephew and niece, the children of a deceased brother, two uncles, two aunts and many descendants of deceased uncles and aunts, the nephew and niece, the two uncles and the two aunts are all of the same degree of kinship, to wit, the third, and it is unnecessary to invoke the rule of representation, and the estate should be distributed equally among them. *Matter of Davenport*. 454

19. 1899, Ch. 76 — *Tax — Transfer Tax upon Contingent Remainders Payable Forthwith Out of Property Transferred*. The rule that future contingent estates are not taxable under the Transfer Tax Act (L. 1896, ch. 908, § 230; amd., L. 1897, ch. 284) until they vest in possession and the beneficial owner ascertained, has been changed by chapter 76 of the Laws of 1899, which provides that "When property is transferred in trust or otherwise, and the rights, interests or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith, out of the property transferred," so that the tax is payable forthwith out of the property transferred, and whoever may ultimately take the property takes that which remains after its payment. The tax is not upon property, but still remains a tax upon succession. *Matter of Vanderbilt*. 69

20. *Idem — Method of Imposing Tax*. An estate in trust created by will for specified periods, with a remainder vested in the beneficiary subject to be defeated by his death before the expiration of such periods, must be separately appraised and the transfer tax determined according to the percentage fixed by the statute for those who are contingently entitled to the estate, and when fixed the tax is forthwith payable out of the trust estate. *Id.*

21. *Idem — Transfer Tax on Succession of Life Tenant — Legislation Required to Make Imposition of Tax Fairer to Life Tenant*. Although the provision of the Transfer Tax Act (L. 1896, ch. 908, § 230; amd., L. 1899, ch. 76) requiring the transfer tax upon contingent remainders to be paid forthwith out of the *corpus* of the estate transferred, has been held to be constitutional, because the rate or amount of tax on the succession of the life tenant is within the discretion of the legislature to prescribe and is, in effect, simply the imposition of an additional tax on the life tenant (See *Matter of Vanderbilt*, 172 N. Y. 69), it seems, bearing in mind the general character of the tax and that the legislature has deemed it right to prescribe different rates of taxation, depending on the relation of the legatee or devisee to the deceased, that, if it is desired to make taxes on remainders payable immediately, it would be fairer to the life tenant to have the tax assessed at the lowest rate of any succession provided for by the will, and that, in case the remainder eventually vesting should prove taxable at a higher rate, then such increased tax should be payable at the time of its enjoyment, and that legislation to that effect should be enacted. *Matter of Brez*. 609

1899, Ch. 370. See par. 22, this title.

22. 1901, Ch. 486 — *New York Charter — Power of Board of Aldermen to Elect Its Own Officers and Appointees Not Restricted by Statutory Provisions Relating to Veteran Soldiers and Civil Service Positions*. A veteran soldier, who was an assistant sergeant-at-arms to the council of the city of New York when the council was abolished and its powers and duties imposed upon the board of aldermen by the new charter of the city (L. 1901, ch.

SESSION LAWS — Continued.

466), is not entitled to a writ of mandamus requiring the board of aldermen to elect him to the position of assistant sergeant-at-arms to that body, under the statute giving preference to veteran soldiers (L. 1899, ch. 370, § 21), or the provision of the charter (§ 1543) requiring that any clerk or employee of any department of the city whose position or employment may be abolished by the abolition of any department, or its consolidation with another, shall be reinstated in the same or a similar position or employment in another department, since the board of aldermen is a legislative body, with power to elect its own officers and attendants, untrammelled by the provisions of the statutes invoked by the relator, which were intended to govern appointments in the various departments of the civil service of the city, and have no application to elective officers or appointees. *Matter of Shaughnessy v. Fornes.* 823

23. 1901, Ch. 602 — *New York (County of), Commissioner of Jurors in — Statute Authorizing Appointment of, by Appellate Division not Violative of Section 2 of Article 10 of Constitution.* Chapter 602 of the Laws of 1901, providing "for the appointment of a commissioner of jurors in each county of the state having a population of one million or more, according to the last preceding census, who shall be appointed by the justices of the Appellate Division of the Supreme Court in the department in which such county is situated, or a majority of them," which conflicts with and repeals prior statutes creating and providing for a commissioner of jurors in the city of New York, does not violate section 2 of article 10 of the Constitution, providing that "All city, town and village officers, whose election or appointment is not provided for by this Constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the Legislature shall designate for that purpose. All other officers, whose election or appointment is not provided for by this Constitution, and all officers, whose offices may hereafter be created by law, shall be elected by the people, or appointed, as the Legislature may direct." The act is a valid exercise of legislative power, because it abolishes the office of commissioner of jurors of the city of New York, which office, not having been provided for by the Constitution, the legislature had the power to abolish, and, so far as the county of New York is concerned, creates a new office after the adoption of the Constitution, viz., a commissioner of jurors of the county of New York, whose functions are to be exercised therein, not in the city, and whose expenses and compensation are made a county charge; the office, therefore, may be filled by election or by appointment in such manner "as the legislature may direct." Such legislation is justified by reason of the enlargement of the city so as to embrace other counties than the county of New York, and it is for the legislature to distribute the powers of local government, as between the city and the county governments, as it may deem best, and this discretion, when not restrained or excluded by some provision of the Constitution, is absolute. *Matter of Allison v. Wells.* 421

SHARES.

Of joint stock association — method of establishing value.

See TAX, 8.

STATUTE OF LIMITATIONS.

Outlawed claim not revived by letter of debtor offering to buy it for a small sum — operation of, suspended by non-residence of debtor, notwithstanding casual visits to the state.

See LIMITATION OF ACTIONS, 1, 2.

Action against trustee for failure to comply with provisions of mortgage — must be commenced within ten years.

See TRUSTS, 4, 5.

STIPULATIONS.

Construction — recitals in extradition warrant.

See EXTRADITION, 5, 10.

STOCK.

Dividends declared out of profits represent income not capital.

See CORPORATIONS.

Of national bank — assessment of, at higher ratio of value than real estate — when equity will not restrain collection of tax.

See TAX, 2.

STOCKHOLDER.

In building and loan association — when may recover amount named in certificate of stock.

See ASSOCIATIONS, 2-6.

STREETS.

Proceedings to lay out, across railroad tracks.

See MUNICIPAL CORPORATIONS, 5.

SURETIES.

Indemnity.

See TRUSTS, 3.

SURROGATE'S COURT.

1. *Judicial Settlement of Administrator's Accounts Void as against Interested Parties Not Cited or Appearing Thereon* — *Effect of Code Civ. Pro. §§ 2518-2523.* A judicial settlement of the accounts of an administrator of an estate is void as against persons interested in the estate, within the meaning of the statute (Code Civ. Pro. § 2514, subd. 11), whether known or unknown, who were not duly cited to appear, or did not appear voluntarily at such judicial settlement; since the Code of Civil Procedure (§§ 2518-2523) provides ample protection to such administrator by permitting him to sue out a citation running against persons unknown. *Matter of Killan.* 547

2. *Unknown Brother of an Intestate Not Cited or Appearing at Judicial Settlement of Estate, May Institute Proceedings for New Accounting upon Notice to Parties Interested and Proof of his Relationship.* A person residing in a foreign country and claiming to be the brother and only next of kin of an intestate, in whose estate there has been a judicial settlement of the accounts of the administrator, to which claimant was not cited and was not a party, is entitled to institute a proceeding in the Surrogate's Court against the administrator for a new accounting under the provisions of the statute (Code Civ. Pro. § 2726, subd. 1, and § 2727), and to an order that a commission issue, with interrogatories, for the examination of the petitioner and his witnesses; and it is reversible error to dismiss such proceeding and deny the application for a commission and remit the petitioner to a motion to open the decree in such judicial settlement, addressed to the discretion of the Surrogate's Court; the proper practice is not to dismiss the proceeding, but to require the petitioner to amend his citation and bring in the parties who were cited or appeared on the original accounting, that all of such parties may join in the application for a commission and be represented at the execution thereof; the petitioner, if he succeeds in establishing that he is a brother of the intestate, may then have an accounting under the provisions of the Code invoked by him. *Id.*

When conclusions of law found in support of decree settling an intestate's estate are reviewable in Court of Appeals.

See APPEAL, 11.

SURROGATE'S COURT — Continued.

Distribution of personal property of intestate leaving nephew and niece and uncles and aunts and descendants of deceased uncles and aunts.

See DECEDENT'S ESTATE.

TAX.

1. *New York City — Power of Equity to Restrain Collection of Tax when no Remedy Exists at Law.* While the provisions of the Consolidation Act (L. 1882, ch. 410, §§ 819-821, as amd. by L. 1885, ch. 811) for the review by certiorari of assessments made in the city of New York are exclusive, the common-law writ of certiorari for that purpose having been superseded thereby, and the statute affording relief only where an assessment is illegal or erroneous by reason of overvaluation, a court of equity has inherent power in a proper case to restrain the collection of the tax imposed upon grounds not provided for by the statute, and for which no relief can be had by certiorari; it is not its province, however, to interfere in a case where the grievance assigned does not relate to some question of fraud or of illegal discrimination or classification. *Mercantile Nat. Bank v. Mayor, etc., of N. Y.* 85

2. *Assessment of National Bank Stock at Higher Ratio of Value than Real Estate — When Equity Will Not Restrain Collection of Tax.* An action will not lie in equity to restrain the collection of a tax imposed upon the stock of a national banking association by the commissioners of taxes and assessments of the city of New York upon the sole ground that the stock was assessed at its actual value while the real estate of the city was assessed at not more than sixty per cent, thus creating an inequality of assessment, whereby the owners of such stock are required to pay an undue proportion of the taxes assessed for city, county and state purposes, although the grievance assigned is not one which, under the statute, can be reached by the writ of certiorari or for which there exists any remedy at law, where, in the absence of evidence to the contrary, it must be presumed that the taxing officers acted honestly and impartially in making the assessment, with no intention to discriminate to the injury of a class of persons or of a species of property, and the valuation as fixed by them was uniform with respect to each class of property. *Id.*

3. *Transfer Tax upon Contingent Remainders Payable Forthwith Out of Property Transferred.* The rule that future contingent estates are not taxable under the Transfer Tax Act (L. 1896, ch. 908, § 230; amd., L. 1897, ch. 284) until they vest in possession and the beneficial owner ascertained, has been changed by chapter 76 of the Laws of 1899, which provides that "When property is transferred in trust or otherwise, and the rights, interests or estates of the transferees are dependent upon contingencies or conditions whereby they may wholly or in part created, defeated extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith, out of the property transferred," so that the tax is payable forthwith out of the property transferred, and whoever may ultimately take the property takes that which remains after its payment. The tax is not upon property, but still remains a tax upon succession. *Matter of Vanderbilt.* 69

4. *Method of Imposing Tax.* An estate in trust created by will for specified periods, with a remainder vested in the beneficiary subject to be defeated by his death before the expiration of such periods, must be separately appraised and the transfer tax determined according to the percentage fixed by the statute for those who are contingently entitled to the estate, and when fixed the tax is forthwith payable out of the trust estate. *Id.*

TAX—Continued.

5. *Illegal Assessment in Westchester County—Land Cannot Be Reassessed without Notice.* An assessment of real estate located in Westchester county, which has been declared illegal by the Supreme Court and ordered stricken from the roll because the name of the non-resident owner had been placed in the first column of the roll among the names of residents, is not an unpaid tax within the meaning of section 3 of chapter 610 of the Laws of 1874, as amended by chapter 193 of the Laws of 1877, authorizing the town board to "examine the account of unpaid taxes" returned to the supervisor by the collector, and, after adding certain percentages, to "reject all taxes on land so imperfectly described or so erroneously assessed that the collection thereof cannot be legally enforced," and authorizing a reassessment by the board of supervisors at their next annual meeting, since the assessment, having been stricken from the roll by a decree of the court, they was no "unpaid tax" to be returned by the collector or presented by the supervisor to the board, and under such circumstances a so-called reassessment must be regarded as a new and original assessment which cannot be properly made without notice to the landowner. *Matter of Douglas v. Bd. Supervisors.* 309

6. *Joint Stock Associations—Shares Are Personal Property and Taxable as Such.* The shares of a joint stock association constitute personal property and are taxable as such, irrespective of the character of the property represented thereby, whether real or personal. *Matter of Jones.* 575

7. *Interest of Deceased Shareholder Subject to Transfer Tax.* The interest of a deceased shareholder in the realty of a joint stock association is personal property, and under chapter 215 of the Laws of 1891 a bequest thereof is subject to the transfer tax. *Id.*

8. *Method of Establishing Value of Shares.* Where the shares are not listed upon the stock exchange or sold in the open market, the value of the realty may be properly considered upon an appraisal in order that their value may be established. *Id.*

9. *Authorities Collated.* The distinction between joint stock associations and corporations pointed out and authorities relating thereto discussed. *Id.*

10. *Transfer Tax on Succession of Life Tenant—Legislation Required to Make Imposition of Tax Fairer to Life Tenant.* Although the provision of the Transfer Tax Act (L. 1896, ch. 908, § 230; amd., L. 1899, ch. 76) requiring the transfer tax upon contingent remainders to be paid forthwith out of the *corpus* of the estate transferred, has been held to be constitutional, because the rate or amount of tax on the succession of the life tenant is within the discretion of the legislature to prescribe and is, in effect, simply the imposition of an additional tax on the life tenant (See *Matter of Vanderbilt*, 172 N. Y. 69), it seems, bearing in mind the general character of the tax and that the legislature has deemed it right to prescribe different rates of taxation, depending on the relation of the legatee or devisee to the deceased, that, if it is desired to make taxes on remainders payable immediately, it would be fairer to the life tenant to have the tax assessed at the lowest rate of any succession provided for by the will, and that, in case the remainder eventually vesting should prove taxable at a higher rate, then such increased tax should be payable at the time of its enjoyment, and that legislation to that effect should be enacted. *Matter of Brez.* 609

TRANSFER TAX

Upon contingent remainders payable forthwith out of property transferred—method of imposing tax.

See *Tax*, 3, 4.

TRANSFER TAX — *Continued.*

Interest of deceased shareholder in joint stock association, subject to.
See TAX, 7.

On succession of life tenant.
See TAX, 10.

TRIAL.

1. *Direction of Verdict — Instructions.* The denial of motions made by counsel on both sides for the direction of a verdict and the submission of the case to the jury cannot be held to have prejudiced either party provided the jury decided the case as the court ought to have decided it, nor in such case is the conduct of the court in charging or refusing to charge the jury material. *Nat. Revere Bank v. Nat. Bank of Republic.* 102

2. *Direction of Verdict — Good Faith.* A bank which has discounted from time to time a series of notes upon the representations of the payee and of the firm which made them, that they were given for value, and which were promptly paid, is not chargeable with negligence or bad faith, and a verdict is properly directed in its favor on that issue, where it subsequently discounted accommodation notes executed to the same payee by a member of the same firm, in the name of the firm, but after its dissolution, of which fact no sufficient notice was given, where the payee represented that the notes were based upon a valid consideration. *Second Nat. Bank v. Weston.* 250

3. *Evidence — Bad Faith.* The purchase by a bank of notes at a discount of eight per cent per annum, when the legal rate of interest is six per cent, is not such an excessive rate of discount as to warrant the inference of bad faith. *Id.*

4. *Interested Witness — Credibility.* The evidence of a party to an action is conclusive, and his credibility is not presented as a question of fact where his testimony is not contradicted by direct evidence nor by any legitimate inference from the evidence, and is neither opposed to the probabilities, nor in its nature surprising or suspicious. *Id.*

5. *Mandamus — Alternative Writ — Effect of a Verdict Directed at Request of Both Parties.* Where both parties to a trial of issues presented by an alternative writ of mandamus request the direction of a verdict, a verdict directed for the relator has the same effect as one found in his favor by a jury after a submission of the case, and where the judgment entered thereon has been affirmed by the Appellate Division the facts must be deemed settled in favor of the relator. *People ex rel. Gleason v. Scannell.* 816

6. *Res Judicata.* An issue finally determined in a former suit between the parties need not be submitted to the jury. *Stokes v. Foote.* 327

7. *Construction of Contract — Question of Law.* The question whether the failure of a party to a contract to purchase all the shares of stock owned by another amounts to a breach of the contract calls for its construction and is a pure question of law. *Id.*

8. *Question for Jury — Immateriality.* An immaterial question need not be submitted to the jury. *Id.*

9. *Injunction to Restrain Nuisance to Leasehold — Expiration of Lease before Trial — Defendant Entitled to Jury Trial.* When an action by a lessee for an injunction to restrain a nuisance, to which has been joined as a mere incident and to avoid multiplicity of suits a legal claim for damages, is, by the expiration of the lease and the vacation of the premises prior to the trial, shorn of all its equitable features, leaving

TRIAL — *Continued.*

nothing but the claim for damages, the defendant is entitled to a trial by jury unless it has been waived. *McNulty v. Mt. Morris El. L. Co.* 410

10. *Action by Wife for Alienation of Husband's Affections—Erroneous Refusal to Charge.* Where, upon the trial of an action brought by a wife against her husband's parents to recover damages for alienating his affections from her, the evidence is conflicting and would have warranted the jury in finding that, if he ever had any affection for her it had been alienated in some other way than by that pursued by the defendants, the refusal of the court to charge that if, at the time of the abandonment, the plaintiff's husband had no affection for her, or that it had been previously alienated by other causes she could not recover, is reversible error. *Servis v. Servis.* 438

11. *Practice of Asking Witnesses Questions, which Counsel Knows Cannot Be Answered, Condemned.* The practice in negligence cases of asking a witness a question which counsel must be assumed to know cannot be answered—in this case, as to whether defendants carried insurance for accident to their employees—is highly reprehensible, and where the trial court or Appellate Division is satisfied that the verdict of the jury has been influenced thereby it should for that reason set aside the verdict. *Coselman v. Dunfee.* 507

Direction of verdict.

See APPEAL, 5.

When application for membership not a necessary part of plaintiff's proof in action to recover upon certificate of building and loan association—*ultra vires* not available as defense when certificate holder has complied with contract in good faith.

See ASSOCIATIONS, 5, 6.

Section 830 of the Code of Civil Procedure, relating to the reading on second trial of testimony of deceased witnesses taken on first trial, applicable to criminal trials—when right of confrontation is not violated.

See CRIMES, 1, 2.

When denial by witness of recollection as to material facts constitutes perjury—when evidence tending to establish the falsity of his denial is not incompetent as tending to prove other offenses—admissibility of evidence as to the probability of the truth of his denial—when defense of irresponsibility for denial of recollection is a question of fact—latitude allowed the district attorney in discussing a criminal case.

See CRIMES, 4-7.

Murder—former jeopardy—question of fact—discharge of jury—new trial—arrest of judgment—evidence of finding of weapon—competency—opinion of lay witness—testimony upon which to form a basis for conjecture inadmissible—when silence of accused does not establish acquiescence—when knowledge as to impulses of deceased inadmissible—admission—striking out erroneous evidence—admissibility of dying declarations—statements as to previous occurrence.

See CRIMES, 8-20.

Parol evidence inadmissible to show that note, absolutely delivered at date thereof, was not to be paid upon the happening of a subsequent contingency.

See EVIDENCE, 1.

Testimony of an expert as to identity of person making marks canceling signature to a will, inadmissible.

See EVIDENCE, 2.

TRIAL — *Continued.*

When parol proof inadmissible, in an action for rescission, to explain or contradict written contract.

See EVIDENCE, 3.

Stipulation — construction — habeas corpus — review of warrant — alibi — evidence — warrant — judicial knowledge — stipulations — recitals in extradition warrant — presumption of offender's presence in demanding state.

See EXTRADITION, 5-11.

Of action to reform life insurance policy — defect of parties defendant.

See INSURANCE, 1.

TRUSTS.

1. *When Life Beneficiary Is Entitled to Stock Dividends as Income.* Where the will of a testator creates a trust during the life of a beneficiary with remainder to his heirs and directs that the entire income of the securities of the trust fund is to be applied as income and that no part of such income shall be diverted to the formation of a sinking fund to replace any loss of the principal by depreciation in value of the securities, such provisions, with others indicating a comprehensiveness of intention with respect to the enjoyment by the beneficiary of the income in connection with the source of the dividend itself, entitle the life tenant and not the remainderman to a stock dividend declared out of "an accumulated net surplus" upon the stock of a corporation in which a portion of the trust estate was invested. *Lowry v. Farmers' Loan & Trust Co.* 137

2. *Corporation — Pledge.* A corporation to which property has been assigned as a pledge for its own protection and indemnity, and the protection and indemnity of others who became the assignor's sureties on the faith of the pledge, may, as a trustee of an express trust, maintain a suit to reclaim the property pledged from the assignor, who had appropriated it to his own use, provided any of the obligations for the security and benefit of which the pledge was made remain undischarged. *Hoffman House v. Foote.* 348

3. *Principal and Surety — Indemnity — Construction.* Under a written assignment of a judgment pledging the sums collected thereon for the protection and security of a specified principal and sureties upon a bond executed for the assignor, clauses providing for the application of the moneys collected "for the purposes above mentioned" and for the benefit of the sureties "as their interest may appear at the time," contemplate the protection and indemnity of all the sureties on the bond, and not merely of that one of them described as principal. *Id.*

4. *Railroad Mortgage — Liability of Trustee to Bondholders for Failure to Comply with Provisions of Mortgage — Action against Trustee, not within Twenty Years Statute of Limitations.* Where a railroad company executed a mortgage, under seal, upon property to be thereafter acquired and constructed, to a trust company as trustee for the holders of the bonds secured by such mortgage, which provided that the bonds should be deposited with the trustee to be certified and issued from time to time at the request of the company, or its president, in writing, the net proceeds thereof to remain in the hands of the trustee to be paid out only for the purpose of acquiring property and constructing and equipping the railroad, and to be "paid out only on the written order or request of the executive committee of the board of directors of the company, or a majority of said committee, in which order or request the president, or acting president, of the company shall in all cases join, and all such orders and requests shall include a written statement, or memorandum, declaring the purpose, or purposes, for which the proceeds of

TRUSTS—Continued.

said bonds so ordered to be paid over are to be appropriated or used," and also provided, in substance, that the company might apply any of the said bonds for the purposes of its incorporation without converting the same into money, and in that case it should furnish a similar statement or memorandum declaring the purpose, or purposes, for which the bonds were to be used, but no positive covenant was made by the trustee to carry out such provisions, an implied covenant to that effect cannot be read into the mortgage upon which an action upon a sealed instrument can be commenced, within twenty years from the execution of the mortgage, against the trustee for its failure to comply with such provisions. *Rhineland v. Farmers' L. & T. Co.* 519

5. *Same*—Action against Trustee for Breach of Implied Legal Duties or Obligations, Must Be Commenced within Ten Years from Time of Breach of Trust. The failure of the trustee to carry out such provisions of the mortgage and protect the interests of the bondholders by refusing to issue bonds and pay out the proceeds thereof until assets available to support the mortgage security should be acquired by the railroad company, unless ordered to do so by the court, constitutes, however, a breach of an implied legal duty or obligation springing from the relation of trustee and *cestus que trust*, upon which an action against the trustee can be maintained by aggrieved bondholders, but such action falls within the provisions of section 388 of the Code of Civil Procedure and must be commenced within ten years from the time of the last delivery of the bonds by the trustee to the railroad company. *Id.*

ULTRA VIRES.

Not available as defense by building and loan association against certificate holder who has complied with contract in good faith.

See ASSOCIATIONS, 5.

USURY.

Pawnbrokers—Chapter 326 of Laws of 1895, Providing "for the Incorporation of Associations for Lending Money on Personal Property," Must Be Construed with and Is Subject to Statutes Relating to Usury—Usurious Loans Made by Such Associations Subject to Penalty of Forfeiture. The statutes relating to usury (1 R. S. 771, and amendments thereto) are not repealed as to corporations formed under chapter 326 of the Laws of 1895, providing "for the incorporation of associations for lending money on personal property * * *" and authorizing such corporations to "take as security for the payment of any such loan either a pledge or a mortgage of any personal property," and to "charge and receive upon each loan * * * interest or discount at a rate not exceeding three per centum per month for a period of two months or less, and not exceeding two per centum per month for any period after said two months;" the effect of the two statutes, when read together, is to increase the rate of interest upon loans covered by the later statute and to apply the penalty of forfeiture prescribed by the Usury Act if the rate so authorized is exceeded; and a person who has borrowed money upon notes secured by chattel mortgages from a corporation organized and doing business under such statute may, upon proof that the corporation has exacted interest and charges upon the loan in excess of the amounts allowed by the statute, maintain an action to have the loan declared void, the notes and mortgages surrendered and the corporation restrained, *pendente lite*, from foreclosing the mortgages. *Louvy v. Collateral Loan Assn.* 394

VENDOR AND PURCHASER.

When vendor of real property who retakes same is not liable for buildings erected thereon by vendee.

See LIEN, 3.

VERDICT.

Direction of.

See APPEAL, 5.

Evidence to support.

See APPEAL, 6.

Court of Appeals has no power to set aside verdict as against the weight of evidence.

See APPEAL, 12.

Direction of.

See TRIAL, 1, 2.

Directed at request of both parties — effect of.

See TRIAL, 5.

Should be set aside when influenced by improper question to witness.

See TRIAL, 11.

VETERANS.

Power of board of aldermen to elect its own officers and appointees not restricted by statutes relating to.

See NEW YORK (CITY OF), 3.

VILLAGES.

Statute requiring that a voter upon a proposition to establish water works in the village of Fulton and issue bonds therefor, or his wife, must be a taxpayer, is not unconstitutional.

See CONSTITUTIONAL LAW, 1.

VOTING.

Qualification of voters in village of Fulton.

See CONSTITUTIONAL LAW, 1.

WAIVER.

Of limitation of action upon life insurance policy.

See INSURANCE, 2.

WARRANT.

Of extradition — review — recitals.

See EXTRADITION, 6, 8, 10.

WIDOW.

When not put to an election between an annuity charged upon real estate and her dower.

See DOWER.

When claim of dower is incompatible with testamentary provisions for.

See WILL.

WILL.

When Claim of Dower Is Incompatible with Testamentary Provisions for the Widow. Under a will devising all of testator's real property, constituting the bulk of his estate, to trustees until his youngest child, about one year old, shall become of age and directing that one-third of the net income, after paying expenses including insurance and repairs, shall be paid to the widow and the other two-thirds expended for the support and education of his children, and upon the expiration of the trust one-third to be conveyed to the widow during her life or widowhood and the other two-thirds to his children, and authorizing the trustees to sell all the real estate of which the testator died "seized and possessed" and

WILL — *Continued.*

to reinvest the proceeds "in such other real estate or profitable securities as to them shall seem proper for the preservation of the said estate and the carrying into effect of the trusts herein created," there is a manifest incompatibility between the provision of the will and a claim of dower by the widow, and she is not entitled thereto in addition to the provisions made for her benefit by the will. *Matter of Gordon.* 25

When widow not put to an election between an annuity charged upon real estate and her dower.

See DOWER.

WITNESS.

When denial of recollection as to material facts constitutes perjury.

See CRIMES, 4.

Interested — credibility.

See TRIAL, 4.

WRITING.

Testimony of an expert as to identity of person making marks canceling signature to a will, inadmissible.

See EVIDENCE, 2.

TABULAR LIST OF OPINIONS.

PARKER, Ch. J.

RAILROAD LAW.

Railroad corporations cannot, in the first instance, be compelled by mandamus to operate trains in a designated manner; Directors' abuse of discretion in operating road may be remedied by Board of Railroad Commissioners, whose determination may be enforced by mandamus and is reviewable by certiorari.

People ex rel. Linton v. B. H. R. R. Co., 90, 95.

PUBLIC HEALTH LAW.

L. 1893, ch. 661, § 148, curing defects in imperfect registration of physicians, retroactive.

Ottaway v. Lowden, 129, 133.

INJUNCTION.

To restrain nuisance to leasehold; Expiration of lease before trial; Defendant entitled to jury trial.

McNulty v. Mt. Morris El. Light Co., 410, 411.

NEW YORK (COUNTY OF).

Commissioner of jurors in; Chapter 602 of Laws of 1901 authorizing appointment of, by Appellate Division, violative of section 2 of article 10 of Constitution. (Dis. op.)

Matter of Allison v. Welde, 421, 432.

HUSBAND AND WIFE.

Action by wife for alienation of husband's affections; Erroneous refusal to charge.

Servis v. Servis, 438, 439.

EVIDENCE.

When parol proof inadmissible in an action for rescission to explain or contradict written contract.

Dady v. O'Rourke, 447, 449.

INSURANCE.

Unreasonable amendment of by-laws depriving beneficiary of rights under policy issued by mutual benefit society.

Weber v. Supreme Tent of K. of M., 490, 492.

RAILROADS.

Provisions of chapter 754 of Laws of 1897, amending section 61 of Railroad Law, must be complied with, although proceeding to lay out street across railroad tracks was commenced before enactment of statute.

Matter of Ludlow Street, 542, 544.

APPEAL.

Court of Appeals has no power to set aside verdict against the weight of evidence.

Merchants' Nat. Bank of Plattsburgh v. Barnes, 618, 619.

GRAY, J.

TAX

New York city; Power of equity to restrain collection of tax when no remedy exists at law; Assessment of national bank stock at higher ratio of value than real estate; When equity will not restrain collection of tax.

Mercantile Nat. Bank v. Mayor, etc., of N. Y., 35, 39.

CORPORATIONS.

Stock dividends declared out of profits represent income, not capital; Trusts; When life beneficiary is entitled to stock dividends as income.

Lowry v. Farmers' Loan & Trust Co., 137, 141.

RAILROADS.

When right to select new terminus and extend existing railroad into an adjoining county is limited.

Matter of G. & J. Ry. Co. v. G. & S. El. R. R., 462, 465.

INSURANCE.

Limitation of action upon policy; Waiver.

Sullivan v. Prudential Ins. Co., 482, 484.

O'BRIEN, J.

TAX

Transfer tax upon contingent remainders not payable forthwith out of property transferred; Method of imposing tax. (Dis. op.)

Matter of Vanderbilt, 69, 74.

APPEAL

Unanimous affirmance; Disputed facts; Direction of verdict; Instructions; Presumption of ownership; Banking; Collection; Presumption of solvency; Objection urged for first time on appeal; Duty of bank as to collections.

Nat. Revere Bank v. Nat. Bank of Republic, 102, 104.

EVIDENCE

Restriction as to use of premises for a saloon when removed by quitclaim deed; Acts and conversations of parties inadmissible to contradict deed.

Uihlein v. Matthews, 154, 155.

PERJURY.

Witness; When denial of recollection as to material facts constitutes perjury; When evidence tending to establish the falsity of his denial is not incompetent as tending to prove other offenses; Admissibility of evidence as to the probability of the truth of his denial; When defense of irresponsibility for denial of recollection is a question of fact; Latitude allowed the district attorney in discussing a criminal case.

People v. Doody, 165, 169.

EXTRADITION.

Constitutional law; Comity; Fugitive from justice; Presence in demanding state; Asylum for criminals; Trial; Stipulation; Construction; Habeas corpus; Review of warrant; Alibi; Evidence; Warrant; Judicial knowledge; Recitals in extradition warrant; Offender's presence in demanding state; Presumption. (Con. op.)

People ex rel. Corkran v. Hyatt, 176, 193.

APPEAL.

Unanimous affirmance; Evidence to support verdict; Partnership; Accommodation indorsement; Estoppel; Evidence; Bad faith.

Bank of Monongahela Valley v. Weston, 259, 261.

MANDAMUS.

Brooklyn (City of); Pensions to widows of members of the police department; L. 1888, ch. 583.

People ex rel. Waddy v. Partridge, 305, 306.

Alternative writ; Effect of a verdict directed at request of both parties; Civil service; Long Island City; Removal of fireman appointed under charter of, by fire commissioner of Greater New York.

People ex rel. Gleason v. Scannell, 316, 318.

NEW YORK (CITY OF).

Power of board of aldermen to elect its own officers and appointees not restricted by statutory provisions relating to veteran soldiers and civil service positions.

Matter of Shaughnessy v. Fornes, 323, 325.

APPEAL.

Nonsuit; Presumption; Trusts; Corporation; Pledge; Principal and surety; Indemnity; Construction.

Hoffman House v. Foote, 348, 349.

RAILROADS.

Right to select new terminus and extend existing railroad into an adjoining county. (Dis. op.)

Matter G. & J. Ry. Co. v. G. & S. El. R. R., 462, 469.

SURROGATE'S COURT.

Person claiming to be brother of an intestate whose estate has been judicially settled, although not cited or appearing upon such judicial settlement, is not entitled to proceeding for a new accounting. (Dis. op.)

Matter of Killan, 547, 561.

PLEADING.

Action to enforce judgment, recovered against a corporation, against its president personally; When allegations of complaint do not state facts constituting a cause of action.

Tilley v. Coykendall, 587, 589.

COMMON CARRIER.

Restriction on valuation in bill of lading; Effect thereof on liability of carrier as insurer of safe delivery of goods. (Dis. op.)

Bermel v. N. Y., N. H. & H. R. R. Co., 639.

BARTLETT, J.

CRIMES.

Section 830 of the Code of Civil Procedure, relating to the reading on second trial of testimony of deceased witness taken on first trial, applicable to criminal trials; When right of confrontation provided for in subdivision 3, section 8, Code of Criminal Procedure, is not violated.

People v. Elliott, 146, 147.

EVIDENCE.

Restriction as to use of premises for a saloon not removed by quitclaim deed; Acts and conversations of parties admissible to contradict deed. (Dis. op.)

Uiblein v. Matthews, 154, 160.

CONTRACT.

Consideration; Condition precedent; Judgment; Conclusiveness; Trial; Res judicata; Construction of contract; Question of law; Question for jury; Immateriality.

Stokes v. Foote, 327, 329.

Injunction to restrain nuisance to leasehold; Expiration of lease before trial; Defendant not entitled to jury trial. (Dis. op.)

McNulty v. Mt. Morris El. Light Co., 410, 416.

HUSBAND AND WIFE.

Action by wife for alienation of husband's affections. (Dis. op.)

Servis v. Servis, 438, 443.

SURROGATE'S COURT.

Distribution of personal property of intestate leaving nephew and niece and uncles and aunts and descendants of deceased uncles and aunts; Code of Civil Procedure, § 2732, subdivision 12, as amended by chapter 319 of the Laws of 1898; Effect of, when construed with subdivisions 5 and 10 of such section.

Matter of Davenport, 454, 455.

RAILROAD MORTGAGE.

Liability of trustee to bondholders for failure to comply with provisions of mortgage; Action against trustee, not within twenty years' Statute of Limitations; Action against trustee for breach of implied legal duties or obligations must be commenced within ten years from time of breach of trust.

Rhineland v. Farmers' Loan & Trust Co., 519, 522.

SURROGATE'S COURT.

Appeal; When conclusions of law found in support of decree settling an intestate's estate reviewable in Court of Appeals; Judicial settlement of administrator's accounts void as against interested parties not cited or appearing thereon; Effect of Code of Civ. Pro. §§ 2518-2523; Unknown brother of an intestate not cited or appearing at judicial settlement of estate may institute proceedings for new accounting upon notice to parties interested and proof of his relationship.

Matter of Killan, 547, 550.

JOINT STOCK ASSOCIATION.

Shares are personal property and taxable as such; Interest of deceased shareholder subject to transfer tax; Method of establishing value of shares; Authorities collated.

Matter of Jones, 575, 577.

CONSTITUTIONAL LAW.

Imposition of transfer tax on succession of life tenant unconstitutional. (Dis. op.)

Matter of Brez, 609, 612.

HAIGHT, J.

LANDLORD AND TENANT.

Leasing premises with knowledge of existing nuisance; Tenant's right of action for damages. (Dis. op.)

Bly v. Edison Electric Illum. Co., 1, 17.

CHARITABLE INSTITUTIONS.

Payments of public moneys to institutions wholly or partly under private control; Rules of the state board of charities; New York Juvenile Asylum; Charter provision

CHARITABLE INSTITUTIONS — *Continued.*

requiring payment by city and county of New York for the support of inmates not committed to it in accordance with rules of state board of charities, superseded by the Constitution.

Matter of New York Juvenile Asylum, 50, 52.

TAX

Transfer tax upon contingent remainders payable forthwith out of property transferred; Method of imposing tax.

Matter of Vanderbilt, 69, 71.

CERTIORARI

Public improvement commission; Appeal; Question of law; Public improvements; Specifications; Guaranty of payment; Contracts; Labor Law; Paving; Hearing.

People ex rel. North v. Featherstonhaugh, 112, 116.

EXTRADITION.

Constitutional law; Comity; Fugitive from justice; Presence in demanding state; Asylum for criminals; Trial; Stipulation; Construction; Habeas corpus; Review of warrant; Alibi; Evidence; Warrant; Judicial knowledge; Recitals in extradition warrant; Offender's presence in demanding state; Presumption. (Dis. op.)

People ex rel. Corkran v. Hyatt, 176, 202.

APPEAL

Certified question involving question not certified cannot be answered by Court of Appeals; Common-law action by executor or administrator; Compulsory reference when examination of long account is involved.

Malone v. Saints Peter and Paul's Church, 269, 271.

EVIDENCE.

Parol evidence admissible to show that note, although absolutely delivered at date thereof, was not to be paid upon the happening of a subsequent contingency. (Dis. op.)

Jamestown Business College Assn. v. Allen, 291, 297.

EVIDENCE

Handwriting; Testimony of an expert as to identity of person making marks canceling signature to a will, inadmissible; Marks not "writings" within the meaning of statutes permitting comparison of handwriting by experts.

Matter of Hopkins, 360, 362.

DOWER.

Widow not put to an election between an annuity charged upon real estate and dower.

Hortsmann v. Flege, 381, 383.

NEW YORK (COUNTY OF).

Commissioner of jurors in; Chapter 602 of Laws of 1901 authorizing appointment of, by Appellate Division, not violative of section 2 of article 10 of Constitution.
Matter of Allison v. Welde, 421, 424.

INSURANCE.

Action to reform life insurance policy and for judgment thereon;
Parties defendant; Code of Civil Procedure, sections 452 and 499. (Dis. op.)
Steinbach v. Prudential Ins. Co., 471, 479.

CONTRACT.

Construction of agreement as to percentage upon an award for land taken.
Matter of Bassford v. Johnson, 488, 489.

SURROGATE'S COURT.

Person claiming to be brother of an intestate whose estate has been judicially settled, although not cited or appearing upon such judicial settlement, is not entitled to proceed-
ing for a new accounting. (Dis. op.)
Matter of Killan, 547, 574.

MARTIN, J.

MURDER.

Trial; Former jeopardy; Discharge of jury; New trial; Arrest of judgment; Evidence; Finding of weapon; Opinion of lay witness; Testimony upon which to form a basis for conjecture inadmissible; When silence of accused does not establish acquiescence; When knowledge as to impulse of deceased inadmissible; Reversible error; Admission; Erroneous evidence; Striking out; Dying declarations; Previous occurrence; Burden of showing erroneous evidence harmless rests on prosecution.
People v. Smith, 210, 217.

BUILDING AND LOAN ASSOCIATIONS.

When shareholder may recover amount named in certificate of stock; Terms and conditions of contract not inconsistent with absolute promise to pay amount named in certificate; Term "withdrawing shareholders" defined; When application for membership not a necessary part of plaintiff's proof in action to recover upon certificate; Ultra vires not available as defense when certificate holder has complied with contract in good faith.

Vought v. Eastern Bldg. & Loan Assn., 508, 511.

RAILROAD MORTGAGE.

Liability of trustee to bondholders for failure to comply with provisions of mortgage; Action against trustee, within twenty years' Statute of Limitations. (Dis. op.)

Rhineland v. Farmers' Loan & Trust Co., 519, 538.

VANN, J.

WILL.

When claim of dower is incompatible with testamentary provisions for the widow.

Matter of Gorden, 25, 28.

MORTGAGE.

Action to foreclose, after foreclosure of another mortgage on other property given in part as collateral security for debt secured by first mortgage, not prohibited by Code Civ. Pro. §§ 1628, 1630.

Reichert v. Stilwell, 88, 86.

APPEAL.

From judgment, only, after denial of motion for new trial; Appellate Division has no power to reverse or review upon the facts.

Collier v. Collins, 99, 101.

CONSTITUTIONAL LAW.

Common-law action by executor or administrator; Compulsory reference when examination of long account is involved, unconstitutional. (Dis. op.)

Malone v. Saints Peter and Paul's Church, 269, 279.

TAX.

Illegal assessment in Westchester county; Land cannot be reassessed without notice.

Matter of Douglas v. Bd. of Supervisors of Westchester Co., 309, 312.

CORPORATIONS.

When interest not allowed after receivership of insolvent corporation; When preferences take effect and interest ceases.

People v. American Loan Trust Co., 371, 375.

PAWNBROKERS.

Chapter 326 of the Laws of 1895, providing "for the incorporation of associations for lending money on personal property," must be construed with and is subject to statutes relating to usury; Usurious loan made by such associations subject to penalty of forfeiture.

Lowry v. Collateral Loan Association, 394, 395.

INSURANCE.

Action to reform life insurance policy and for judgment thereon; Parties defendant; Code of Civil Procedure, §§ 452 and 499.

Steinbach v. Prudential Ins. Co., 471, 476.

CULLEN, J.

MECHANIC'S LIEN.

Landlord not liable for improvements made by tenant for sole benefit of tenant under provisions of lease; Landlord liable for improvements made by tenant before execution of lease and before possession of property given to tenant.

Rice v. Culver, 60, 63.

TAX.

Transfer tax upon contingent remainders payable forthwith out of property transferred; Method of imposing tax. (Con. op.)

Matter of Vanderbilt, 69, 73.

EXTRADITION.

Constitutional law; Comity; Fugitive from justice; Presence in demanding state; Asylum for criminals; Trial; Stipulation; Construction; Habeas corpus; Review of warrant; Alibi; Evidence; Warrant; Judicial knowledge; Recitals in extradition warrant; Offender's presence in demanding state; Presumption.

People ex rel. Corkran v. Hyatt, 176, 180.

BANKING.

Construction of rules of New York clearing house concerning repayment of commercial paper returned as "not good;" Promissory note; Erroneous certification, of which holder is immediately notified; When paid through clearing house amount thereof may be recovered from bank receiving it.

Mt. Morris Bank v. Twenty-third Ward Bank, 244, 246.

MANDAMUS.

Alternative writ; Effect of a verdict directed at request of both parties; Civil service; Long Island City; Removal of fireman appointed under charter of, by fire commissioner of Greater New York. (Con. op.)

People ex rel. Gleason v. Scannell, 316, 321.

APPEAL.

Nonsuit; Presumption; Trusts; Corporation; Pledge; Principal and surety; Indemnity; Construction. (Dis. op.)

Hoffman House v. Foote, 348, 356.

SURROGATE'S COURT.

Distribution of personal property of intestate leaving nephew and niece and uncles and aunts and descendants of deceased uncles and aunts; Code of Civil Procedure, § 2732, subdivision 12, as amended by chapter 319 of Laws of 1898; Effect of, when construed with subdivisions 5 and 10 of such section. (Dis. op.)

Matter of Davenport, 454, 459.

STATUTE OF LIMITATIONS.

Outlawed claim not revived by letter of debtor offering to buy it for a small sum; Operation of statute suspended by non-residence of debtor, notwithstanding casual visits to the state.

Connecticut Trust & S. D. Co. v. Wead, 497, 499.

APPEAL.

Question of law; Direction of verdict; Good faith; Evidence; Bad faith; Interested witness; Credibility.

Second Nat. Bank of Morgantown v. Weston, 250, 252.

Transfer tax on succession of life tenant; Legislation required to make imposition of tax fairer to life tenant.

Matter of Brez, 609, 610.

WERNER, J.

LANDLORD AND TENANT.

Leasing premises with knowledge of existing nuisance; Tenant's right of action for damages.

Bly v. Edison Electric Illum. Co., 1, 4.

EVIDENCE.

Parol evidence inadmissible to show that note absolutely delivered at date thereof, was not to be paid upon the happening of a subsequent contingency.

Jamestown Business College Assn. v. Allen, 291, 294.

APPEAL.

When judgment of modification by Appellate Division, which is in effect a reversal, should grant a new trial.

Van Siclen v. City of New York, 504, 505.

PER CURIAM.

VILLAGES.

Constitutional law; The statute (L. 1898, ch. 269, art. 2, § 5) requiring that a voter for a proposition to establish waterworks in the village of Fulton and issue bonds therefor, or his wife, must be a taxpayer, is not unconstitutional.

Spitzer v. Village of Fulton, 285, 287.

MECHANIC'S LIEN.

When vendor of real property is not liable for buildings erected by vendee to whom possession is given "for the purpose of erecting buildings thereon."

Beck v. Catholic University, 387, 390.

LANDLORD AND TENANT.

When action after default in payment of installments of rent cannot embrace damages for a total breach of lease; Measure of damages.

McCready v. Lindenborn, 400, 405.

APPEAL.

Order of Appellate Division cannot be reviewed upon appeal taken direct from decree of Surrogate's Court made after and in accordance with such order.

Matter of Union Trust Co., 494, 496.

NEGLIGENCE.

Practice of asking witnesses questions, which counsel knows cannot be answered, condemned.

Cosselmon v. Dunfee, 507.

PAWNBROKERS.

Usurious loans made by associations incorporated under chapter 326 of Laws of 1895, held subject to penalty of forfeiture upon opinion rendered in Lowry against same defendant (172 N. Y. 394).

Lowry v. Collateral Loan Association, 633.

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